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Rulejuggling

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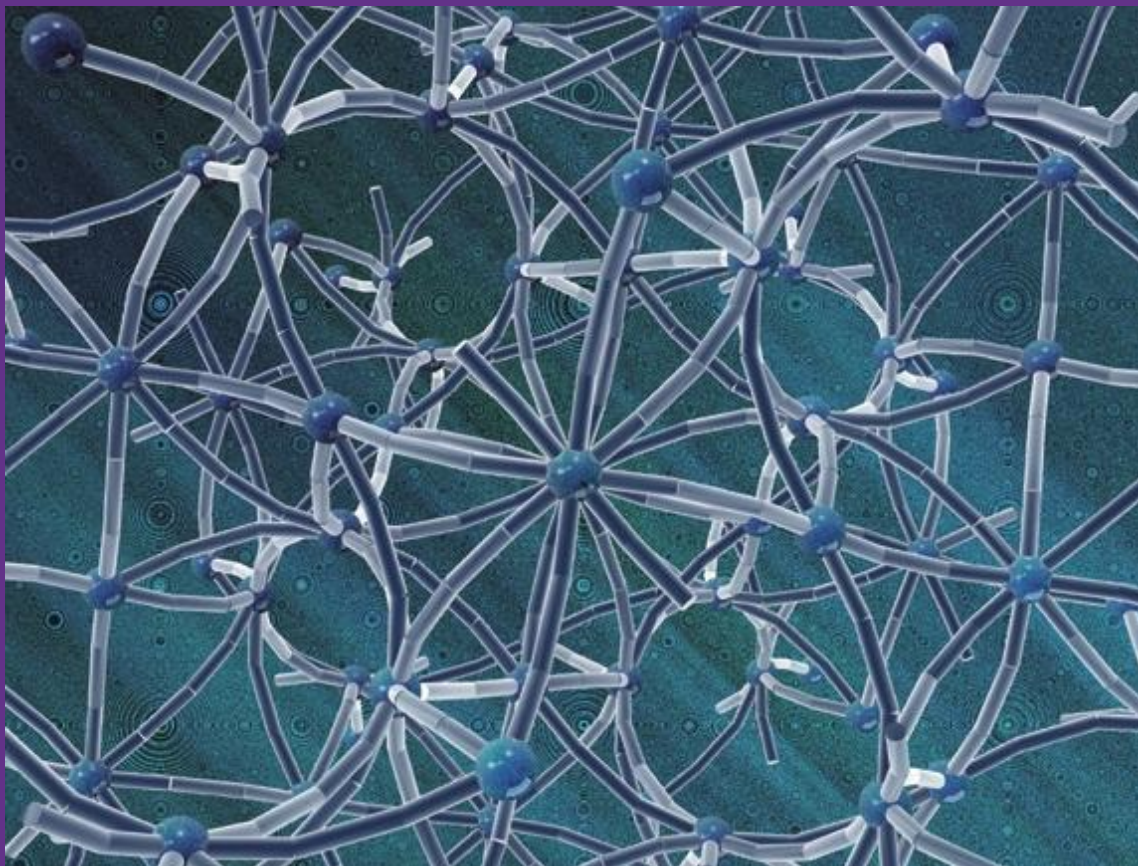
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Trend Report



Rulejungling

When lawmaking goes private, international and informal

Based on nine projects with leading researchers on multilevel rulemaking

Trend Report Rulejungling

When lawmaking goes private, international and informal

Facilitated by HiiL

Maurits Barendrecht, David Raič, Ronald Janse, Sam Muller

This report is based on the following research projects commissioned by HiiL:

- The Internationalisation of the Rule of Law: Changing Contexts and New Challenges, Project Leaders: Professor André Nollkaemper, Professor Randy Peerenboom, Professor Michael Zürn
- Informal International Lawmaking, Project leaders: Professor Joost Pauwelyn, Professor Jan Wouters, Professor Ramses Wessel
- Convergence and Divergence of Legal Systems, Project leaders: Professor Pierre Larouche
- National Constitutional Law in a Globalising World, Project leader: Professor Leonard Besselink
- Private Transnational Regulation: Constitutional Foundations and Governance Design, Project leaders: Professor Fabrizio Cafaggi, Professor Linda Senden, Professor Colin Scott
- General Rules and Principles of International Criminal Procedure, Project leader: Professor Göran Sluiter
- Harmonizing Private Law in Europe: A Mission Impossible? National Resistance against the Europeanisation of Private Law, Project leaders: Professor Jan Smits, Professor Martijn Hesselink
- National Judges as European Community Judges, Project leaders: Professor Mark Wissink, Professor Fabian Ambtenbrink, Professor Marc Hertogh
- Judicial dialogue leads to a more coherent transnational legal system, The Changing Role of Highest Courts in an Internationalising World, Project leaders: Professor Ton Hol, Professor John Bell, Professor Andrea Lollini

The project leaders have commented on drafts, but HiiL is solely responsible for the content of this report.

Table of Contents

Executive Summary	3
1. Every Body Makes Rules	9
1.1 Introduction	10
1.2 Trends and Triggers	13
1.3 Aims of this Report	22
1.4 Data Used and Methodology	25
2. How to Assess Multilevel Rulemaking?	27
2.1 Rule of law safeguards	28
2.2 Economic analysis of rulemaking failure	31
2.3 Assessing impacts and outcomes	32
3. Opportunities and Coping with Challenges	34
3.1 More rules, more protection, generally	35
3.2 Participation hard to achieve	37
3.3 Transparency of processes: Not easy to practice what you preach	41
3.4 Accountability spread thinly	46
3.5 Litigation and access to justice coping with all these rules	48
3.6 Avoiding bureaucracy by smart compliance	52
3.7 Rather effective?	56
4. Changing Roles of Professionals	60
4.1 Rule makers in parliaments see their jobs change	61
4.2 Legislation professionals need new strategies	62
4.3 Corporate lawyers leading the way	65
4.4 Judges and lawyers cope if they specialise	68
4.5 Justices in highest courts: change is coming	70
5. The Future of Rulemaking	74
5.1 Can we Trust Multilevel Rulemaking?	75
5.2 Fundamental New Roles for the State	78
5.3 Looking for trustees: the future of the rulemaking profession	79
List of Contributors	81
List of Abbreviations	82

Executive Summary

Rulejungle and trust

For most of the 20th century, the power to set rules was concentrated in the nation state. This changed when international organisations started to appear on the scene; it changed even more dramatically in the age of globalisation, where **private, informal and international rulemaking** is becoming more and more prevalent. Now, all you need to create rules is a well-organised group of people and a website. Such a body can set rules for others and try to gain legitimacy, often with rather minimal control by national lawmakers.

Although many of these new rules clearly benefit our safety and our prosperity, the new ways of making rules also cause **widespread distrust**. Communities want to govern themselves and ever more rules coming in from the outside sharply contrasts with this desire. One way we have learned to anchor trust is through rule of law, a set of governance principles on accountability, transparency, and access to justice. These principles developed alongside the nation state, which is closely connected to centralised rulemaking: a nation, living within set borders, who makes and enforces the rules that govern its members within those borders. Even if rulemaking power is in the hands of a small elite, where it resides is at least clear. But what happens if the rules are not set primarily within that nation state? Can international or transnational institutions also bind and connect communities to shared values and rules they recognise as their own? Or are invisible elites from abroad now calling the shots? For many people in the world, the new rulemaking processes are hidden, creating fear that the others “out there” will grab the biggest slice of the pie, with rules and lawyers merely dressing the windows.

How can we trust the private, informal and international rule making processes? What do we need from those involved in guarding these processes? That is what we explore in this report.

Trends

Nowadays, **rules come from many directions**. Norms and guidelines that enable a safe flight from Paris to Buenos Aires are produced in national parliaments, in Brussels, at the UN, but also by companies, non-governmental organisations (NGOs), trade organisations, at meetings of the world’s leaders or by other informal mechanisms. Standards regarding emissions or child labour are set at local, national, regional and international levels. Courts, arbitration tribunals, regulatory agencies, complaint commissions, supervisory bodies, experts and media all play their part in ensuring compliance with standards for financial services, the quality of coffee and the trade in diamonds. Companies increasingly commit themselves by unilateral policies on their websites, setting rules for themselves, instead of waiting to be regulated.

In general, state-based legislation is becoming less prominent and rulemaking by multilateral treaties between states is in retreat. But we don’t see fewer rules. Overall, rulemaking is becoming **less formal, more private, less hierarchical, more competitive and more contractual**. Guidelines, aimed at achieving clearly stated goals, are now more frequent than binding rules.

What triggers this development? It can be partly explained by an ever-increasing **need for effective coordination**. We need quality standards, safety requirements and ways to deal with the possible impact of activities on other persons. The new rulemaking approaches have gradually become more attractive because the most relevant stakeholders can be invited to participate in them and the best expertise can be mobilized.

Rulemaking in these networks does not require formal consent from participants, making it easier to achieve results. These **open networks can learn more quickly** about effects. In this way, private rules gain a competitive advantage. Formal laws and enforcement by regulators, police, forced sale of assets and detention are still needed.

But they are increasingly used as an option to create incentives for adequate private rulemaking: “You solve the problem together or be legislated”. Usually, stakeholders prefer a private, negotiated solution to the one imposed from above.

Private, negotiated rulemaking seems to be less attractive when interests are not aligned. When distributive issues dominate, bargaining can easily fail, and the more powerful interests may prevail. Informal rulemaking networks are now also being set up to issue **standards for the relations between states and citizens**. Unemployment benefits for those losing their jobs because of globalisation, smart tax collection, preventing police corruption, child support after divorce and adequate responses to domestic violence; for each of these issues there are guidelines by the Organisation for Economic Co-operation and Development (OECD), protocols suggested by experts or standards developed by international groups of academics.

Every state is now pressured by other states, companies and citizen groups to change its rules in the direction of these best practices. Many people experience this as **losing autonomy** and being pushed around by Brussels or Washington, or even worse, by the powerful interests that are well- represented over there.

Approach in this report

This report explores **the benefits, the challenges and the emerging best practices** of multilevel rulemaking. We focus on transnational private rulemaking by networks of companies, national regulators and other stakeholders and on informal rulemaking by government agents. This is where most innovation took place during the past 20 years.

At this stage, there are **no tools to evaluate** the vast worldwide rulemaking activity in any comprehensive way. Based on a review of the literature, on 10 major research projects and on the knowledge embedded in HiIL’s own international rule of law networks, we used three perspectives for evaluating the new rulemaking environment. Are rule of law values guaranteed? Do the new forms of rulemaking decrease or increase the probability of what economists call regulatory failure and regulatory capture? And what can we say about impacts and fairness of outcomes?

The benefits: Better collective brains

Rules are our collective brains. They are a repository of knowledge about how to do things together. **More links and more nodes between rule makers increase our capacity** to generate guidelines for cooperation. Generally, citizens and businesses benefit from this increased rulemaking activity. If one rulemaking body does not protect their interests, they can go around it and get their interests protected at the next node. Competition between national, international, formal and informal rulemaking networks increases the probability of reaching consensus somewhere about appropriate protection.

The **flexible, guideline type of rulemaking** that is currently the trend makes it easier to create general baseline protection, to be adapted to specific, national situations when necessary. Every additional network creates new venues for complaints, more opportunities for influencing, more enforcement capabilities and more delivery of public goods over and above what the individual state can do.

Challenges

Economists have shown, and practice has confirmed, that private rulemaking is almost always **a by-product of other activities**, because it is very hard to fund and organise independent rulemaking for the common good. So there are reasons to scrutinise these processes and to look for reasons why we can trust them at all.

It is often difficult, if not impossible, to pinpoint who is responsible for failures of a cross-border regulatory regime. But **a fair amount of accountability** is achieved in other ways. The resulting rules and guidelines tend to be available for the public. So stakeholders, experts, NGOs and journalists can criticise them, mobilizing the court of public opinion. Although it is uncertain how responsive the rulemaking network will be, it can adjust rules quickly if necessary, whereas rules in treaties, judge-made law and statutes can take a long time to change. Besides, there is always the option of going to another network to let it deal with a flaw in the present rules, or to set up a new one.

Networks make rules and also help to **ensure compliance**. People setting the norms also tend to know best what to monitor and how to make the system work. However, separation of powers, a traditional rule of law safeguard, is not always guaranteed and it is unclear yet whether other safeguards can successfully replace it.

In a setting of multilevel rulemaking, what matters in the end is the sum of the effects of all rules. So it is difficult to measure the effect of each separate rule. But rules at different levels may overlap, conflict, leave certain areas uncovered, or create disproportionate compliance costs, which may lead to ignoring the rules. Most commentators tend to evaluate the contributions from private rulemaking in a positive way. Not everything works as expected, but **feedback mechanisms tend to improve things gradually**. And if a rule does not work, it is likely to be ignored. At the same time, there are situations where the new rulemaking bodies failed rather obviously to protect certain interests and where there are serious indications of regulatory capture by stakeholders. The informal and private regulation of the financial sector is a case in point.

Four major needs for innovation

We found four major issues. Here, innovation is needed to ensure that rulemaking processes become more consistent with rule of law values, become less prone to regulatory failure or capture and become more effective.

1. **Meaningful participation of citizens and end-users** | Often, end-users of products and services (consumers) are not involved or represented, and the same is true for lower income countries. Most networks do not exclude these voices deliberately. They find it hard to organise meaningful participation in an effective way. But this is a threat to legitimacy and trust among the population. More open membership policies, consultations, notice and comment procedures, e-participation and involving national parliaments have been tried. But we need much more creativity and many more innovative processes that give voice to the many, starting from the problems as citizens perceive them.
2. **Transparency: Making it more attractive to open the doors** | The new rulemaking processes are not always transparent. The Group of Twenty Finance Ministers and Central Bank Governors (G20), and the Financial Stability Board (FSB) do not even publish their agendas. It is unclear who is present in meetings. Rulemaking bodies receive data about compliance that are often not shared. They do not always publish summaries of comments received. Meetings invariably take place behind closed doors. Transparency is widely shared as a value, but there is a big gap with how informal rule makers practice it. The same is true for state-based deliberation processes in courts, cabinets and ministries, however.

There is a more general issue of actual decision-making taking place behind thick walls plastered with executive privilege, protection of trade secrets and defences against the media. Although privacy and the necessity to bargain have to be taken into account, innovations are possible. Technical norm-setting bodies, such as ISO, the *Deutsches Institut für Normung* (DIN) and the American National Standards Institute (ANSI), have developed rather transparent procedures. Such innovations should make it more attractive to open up rulemaking processes. Showing how particular issues are dealt with by rules, even if this rulemaking happens far away by a group of experts, is a way to increase trust.

3. **Building bridges between competing rules** | Multilevel rulemaking impacts the way conflicts are being solved. On the one hand, it creates more guidelines that can help solve problems in a fair way. But it can also lead to endless satellite litigation about which rule is applicable. Courts need innovative solutions to “conflicts of many, many laws.” Thought leaders such as Paul Schiff Berman and Patrick Glenn suggest that rule systems will converge through learning and adaptation processes. Substantive, in-between solutions are the way forward when rule systems compete. The sovereignty of states can also be respected by giving their rules appropriate weights, instead of exclusive jurisdiction.
4. **Reducing the burdens of using rules** | Companies may be confronted with many overlapping compliance mechanisms, creating huge administrative costs and occasionally prolonged litigation before different forums. This is perhaps the biggest source of dissatisfaction with rules and laws. But deregulation, in the sense of doing away with rules, is not likely to be the answer as long as the underlying need for coordination and standardisation is there to stay. It is likely to trigger new rulemaking efforts immediately. Finding a better answer is urgent: innovation should move in the direction of developing sophisticated compliance mechanisms in a setting of multilevel rulemaking, minimising costs and risks. There is already some progress in finding the right mix of licensing, certification, reporting, monitoring and complaint handling. One key issue is that we need a more fair court of public opinion, because that is increasingly the place where rules are made and enforced.

Changing roles of legal professionals and possible strategies

Multilevel rulemaking has a huge impact on rulemaking professionals. **Politicians in parliaments** use a number of strategies to cope with the present realities, knowing they can no longer pretend that they are in charge. Some of them are hardly involved anymore in rulemaking, others participate in informal processes, or focus on simple problems, with simple, salient solutions that can be implemented by a statute. Parliamentarians hardly have resources to participate in a meaningful way in all rulemaking. Across the board, the design of national law-making and approval procedures is often outdated and needs improvement.

Legislation professionals are faced with dilemmas as well. Should they stick to ensuring coherence of their national body of laws, more or less ignoring the wealth and quality of rules developing in the international regulatory scene, only incorporating rules if there is a formal obligation? Should they cater to the increasing needs for up-to-date legal information among citizens by new forms of codification? Or should they leave this to the market? We found that legislation professionals increasingly participate in informal coordination. But we also identified a number of strategies that have not yet been used, suggesting that they still need to adapt their working methods and procedures to the new realities.

Corporate counsels and the law firms assisting them do not seem to mind where rules come from. Many companies prefer standards that are similar for all the markets in which they work, so that standardisation of products and services is possible, and administrative costs are low. Vague rules and unexpected changes to rules that have a major impact on their business models are an issue for them. The same is true for rules that protect the interests of national businesses, tilting the playing field. So companies and their trade organisations are heavily involved in rulemaking and standard-setting. Increasingly, they experience that compliance with informal guidelines is expected of them.

By designing and publishing company guidelines, policies and complaint mechanisms, they can show to their stakeholders that they live up to the highest standards. By doing more than is expected of them, they can escape the practical problems arising from all these rules changing all the time.

For **judges and lawyers**, the impact of multilevel rulemaking is much more limited. Judges do not really seem to worry about it. The ground rules for civil liability, getting a licence and criminal prosecution are still national. For judges and lawyers, international guidelines and standards are mainly new sources of criteria, competing with case law, national statutes and national regulation. Increasingly, similar disputes come up simultaneously in many countries, creating the need for cross-border coordination of litigation. Specialisation and working from protocols for dispute resolution seems to be the future here.

Highest courts experience somewhat more tensions. They have been set up as national bodies protecting the integrity of national legal systems, but are swimming in a sea of international rules and private standards. In their day-to-day practice, they have not changed much. They do participate in informal networks and exchange experiences. More fundamental change may be needed. Appeals to higher courts can be a major reason for prolonged uncertainty. Moreover, final, binding interpretations of *the law* by highest courts do not go well with the trend towards flexible, well-informed production of rules by many rule makers.

Can we trust multilevel rulemaking?

So what is the bottom line? We are living in a global legal environment. Every one of us is feeling the impact of millions of rules produced in many different places. Nobody knows them all. There are **many reasons not to trust these rules**. Participation by citizens, consumers and employees and transparency are often not guaranteed. Those involved in rulemaking do this mainly to advance their own interests. The national state is not really in control.

Still, **people rely on rules every day** when they take a plane, fill their plates with products from the supermarket or invest in their pensions. And they have reasons to do so, because accountability is an asset for most companies and other organisations, because rulemaking takes place in the shadow of the court of public opinion and because an international regulatory profession is emerging with people who feel responsible for rules that serve the greatest good for all. However, there are situations where private and informal rulemaking processes are less likely to produce fair and effective outcomes.

We found **seven signs of possible trouble, situations in which there is reason for increased surveillance of rules and rulemaking processes**

- When stakeholders want different final outcomes,
- When responsibility is shifted from stakeholders to rulemaking bodies,
- When outcomes are difficult to monitor,
- When regulatory capture is hard to avoid,
- When citizens and users are not well-organised and represented,
- When new threats emerge; and
- When a problem cannot be quarantined.

The future of the national state

Institutions of the national state still have a comparative advantage. But these rulemaking behemoths are in a similar position as national telephone incumbents were after their markets opened up. Gradually, newer, sometimes very innovative rulemaking processes are taking over. So parliaments, national ministries, highest courts, political parties and others feeling responsible for the national state have **every reason to rethink their strategies**. Clinging to traditional state powers is not attractive in this setting.

New ways to deal with conflicts of laws have to be developed. One option is to specialise in the direction of stimulating effective multilevel rulemaking, which creates new opportunities for tackling the most urgent global problems in a decentralised way. Providing legitimacy to outcomes is still an important role for the national state, as can be the systematic monitoring of effectiveness.

Instead of branding rules as foreign, or building their rules from scratch down from the constitution, old and new states now have the opportunity to benefit from international experiences. Taking the most urgent needs for rules in their own country one by one, they can improve what they have in the direction of **international best practice**. Local stakeholder networks, linking up with the highly specialised rule makers from abroad, can adapt rules where necessary. Involving groups of citizens, in particular groups that fear to be cheated, is essential though.

Looking for trustees: Towards a global rulemaking profession

The rule makers described in this report mostly have law as their background. Although the legal profession has no formal role in most constitutions, many people think lawyers ensure the quality and integrity of rulemaking. Most lawyers identify with this role as **guardians of the rule of law and justice**. However, many of them still tend to work from national legal principles, rules and procedures, testing compliance with these rules, sometimes in a rather formalistic way.

Lawyers as a group may raise suspicion because their involvement does not really guarantee that the new types of rules are fair and address the issues that are important to the many. Lawyers involved in informal and private processes risk being seen as only working for vested interests, in largely secret processes, producing an overload of norms, earning money from all these conflicting rules, rather than building bridges of fairness between people. Other professions nibble at their role of guarantors of justice, as is already happening in the areas of rule design (economists), compliance (accountants) and dispute resolution (a variety of alternative dispute resolution providers).

There is much to gain if a dynamic **international rulemaking profession** would emerge. Knowing the most effective methods of rulemaking, measuring and monitoring fairness, spotting regulatory failure and capture, finding innovative ways to guarantee transparency, involving local communities in a meaningful way, that could become the core of this profession. Citizens would be able to rely on these professionals. As a collective, they would guarantee the fairness of rules in a similar way as the international medical profession can be relied on for health issues.

This could also give new dynamism to the legal profession. Safeguarding the quality of rulemaking processes, wherever they take place, may be a more attractive proposition for young lawyers than just learning how to apply the rules of one national legal system. Such a development would bring the **legal profession** much closer to the points in the rule production chain where most value is created. They would be seen as the ones that can make rules work for people instead of against them.

For the consolidation of a global rulemaking profession, **leadership is needed**. Traditional leaders of the legal profession, such as presidents of bar associations, supreme court justices and deans of law faculties, will not find it easy to take up this role. Should leadership come from international law firms, providers of innovative legal services through the internet or from rule makers becoming involved in the countless private and informal institutions discussed in this report? They are at the centre of current rulemaking activity and do not carry the burden of institutions that exemplify the national legal system.

These new leaders will also be able to press for the **necessary changes in legal education**. Future lawyers will have to learn to make wise choices between countless different options for setting rules and solving disputes. Most of the current students will work in highly specialised environments, where rules are adjusted from day to day. So they require interactive rulemaking skills, ensuring that rules are based on the best available evidence. And, above all, they need to know the methods to enhance the values behind the rule of law and justice.

1. Every Body Makes Rules



1.1 Introduction

Fear of flying

A passenger taking an airplane from, say, Paris to Buenos Aires trusts many other people. His safe return to the ground depends on flawless cooperation of pilots, flight attendants, catering services, food processing companies, airplane constructors, the thousands of subcontractors providing key parts of an airplane, security personnel, travel agencies, airport mechanics, and many, many more. The interaction and the division of responsibilities between all these people crucially depend on the quality of rules. As travellers, we are not aware of the millions of rules that enable our journey. We may sense their presence when the flight attendant performs her duty of showing us the location of the emergency exit and when we read the safety regulations on posters while waiting in line at the security checkpoint. If our clothes disappear from a luggage belt in another part of the world, we may look to rules for compensation. But an explanation of these regulatory instruments cannot be found between the items in the in-flight magazine.

Rule encyclopedias

If such a booklet existed, it should be an e-book, because thousands of rules and guidelines on paper would more than eat up the most generous baggage allowance. Opening the folder, the traveller would certainly find rules set by the International Civil Aviation Organisation (ICAO), regional organisations, such as the European Aviation Safety Agency, the European Organisation for the Safety of Air Navigation (EUROCONTROL) and the European Civil Aviation Conference (ECAC). These are international governmental organisations, set up by formal agreements between states, following the rules in their constitutions about international treaty-making. Other rules come from national legislators. But most of the rules come from private organisations such as the International Air Transport Association (IATA), the Association of European Airlines (AEA), European Regions Airline Association (ERA), the European Low Fares Airline Association (ELFAA), the African Airlines Association (AFRAA), the Association of Asia Pacific Airlines (AAPA), the Civil Air Navigation Services Organisation (CANSO), International Business Aviation Council (IBAC), the International Air Carrier Association (IACA), and the International Federation of Air Line Pilots' Associations (IFALPA). These are the private gatherings in which airlines, pilots and other groups of stakeholders have organised themselves.

Networks and connections

These rules are all connected and work in concert like the neurons in a human brain. International organisations rely on domestic aviation authorities to ensure implementation of many of their regulations and standards. So they need the Airport Management Services Establishment of Algeria, the Australian Civil Aviation Safety Authority, the Directorate General of Civil Aviation of Ecuador, the Japan Civil Aviation Bureau, and the Dutch Ministry of Transport, Public Works and Water Management, to name just a few of the 140 such authorities. Industry standards, such as IATA resolutions or ICAO safety regulations, are often adopted by states, acquiring the status of national law. In such cases, the national authority may monitor some of the many persons that have to touch a plane before it can take off. Another part of the monitoring and enforcement is done by the international private networks. And the other way around, these industry-based private networks see to it that their members follow ICAO standards, imposing sanctions if they fail to do so. IATA and IFALPA — as well as other private organisations — frequently design and implement protocols and procedures outlining how international standards can be implemented in a workable manner. This cooperation also exists when the rules are created. Some private networks have an observer status with international organisations, so they participate in and influence the standard-setting process. Others do not have such a status, but lobby their way into the minds of those allowed to enter the conference room, because their *raison d'être* is to ensure representation of their members in these processes.

Brains of human cooperation

The global regulatory networks around civil aviation are just one example of the rule systems that govern coffee production, contributions to Wikipedia, the services of architects and every other thinkable activity in which human beings have to cooperate.

These rules are the brain systems of human cooperation, saving the collective knowledge of how to organise things on hard drives accessible to all, suggesting to people how to coordinate their tasks, telling them how to manage risks, connecting regulators, ensuring compensation if something goes wrong and excluding the ones who do not comply with the rules of the game.

Passengers not well organised

One group of stakeholders is conspicuously absent in these processes, however. The customer of civil aviation services does not seem to be too worried about being represented. Yes, there are some organisations that aim to mitigate the fear and travails of flying. But their websites tend to be full of dead links and old news. The most successful ones are Expedia lookalikes, more intermediary than really representing the customers. Their existence illustrates that it is very hard to attract members or to find another sustainable business model for mobilising a great number of people. As we will see, this is one of the major challenges in rulemaking processes that has not yet really been addressed or solved. We will also investigate why some of the passenger's interests are protected very well, such as their safety, whereas passengers still have to wait in line interminably at immigration, check in, security checks and when boarding.

Freedom and constraints

Laws, rules, guidelines or principles created by multilevel governance also limit freedoms. They determine what travellers may or may not carry with them. They affect the air citizens breathe and the amount of noise they should accept. They pose constraints on what businesses can do. National and international advertisement regulators make rules on the permissibility of particular advertisements, thereby limiting citizen's rights of information. Pharmaceutical companies, in cooperation with a limited number of states, decide on the standards under which clinical trials may be conducted. These conditions are very hard to meet in developing countries, however, limiting their clinical research and threatening their access to health care.¹ Of course, those who create the regulatory regimes will claim that these regimes do not only aim at safeguarding their own interests in secure clinical trials, but also aim at protecting the public interest: the safety of the traveller in the case of civil aviation,² the morals and rights of others in the case of advertisements,³ and public health in the case of the regulation of medicine.⁴ Still, the effects can be that the rights of others are threatened.

Can we trust them?

The question whether we can trust these systems is behind many of the current policy debates. The G20, and the countless organisations involved in the financial crisis, are the collective brains that should get us out of the banking crisis. But are these brains wired to let all of us share the burdens fairly or are they biased to see banks and states as institutions that should be saved instead of saving the people in the country? Populists and their followers say they do not trust "Brussels" or the international rulebooks pouring out of Washington DC. They seem to prefer a rule system that is run closer to their homes and reflects more of their national interests and values.

The role of the nation state

One way we have learned to anchor trust is through rule of law, a set of governance principles on accountability, transparency, rule-based administration, enforcement and access to justice. These principles developed alongside the nation state and are shaped entirely within this idea. A people, living within set borders, make and enforce the rules that govern them within those borders. But what happens if the brain system of human cooperation is no longer solely organised within that nation state? Is national rule of law as we have used it up till now still adequate to anchor trust? Can it still bind and connect communities to shared values and rules they recognise as their own?

¹ T. Corthaut, B. Demeyere, N. Hachez, & J. Wouters, Operationalising Accountability in Respect of Informal International Lawmaking Mechanisms, in: J. Pauwelyn, R. Wessel & J. Wouters (Eds.), *Informal International Lawmaking*, Chapter 14 (2012) (forthcoming).

² 2006 Convention on International Civil Aviation, Doc 7300/9, Article 3 bis.

³ See, e.g., EASA, Advertising Self-Regulation Charter, EASA Summit, 25 June 2004

⁴ See, e.g., the ICH Safety Guidelines, available at <http://www.ich.org/products/guidelines/safety/article/safety-guidelines.html>.

The many rule makers safeguarding civil aviation

International organisations:

International Civil Aviation Organisation (ICAO)

Regional organisations:

European Aviation Safety Agency (EASA)
EUROCONTROL
European Civil Aviation Conference (ECAC)
European Air Navigation Planning Group (EANPG)

National civil aviation associations:

British Business and General Aviation Association (BBGA)
Canadian Business Aviation Association (CBAA)
European Business Aviation Association (EBAA)
German Business Aviation Association (GBAA)
National Business Aviation Association (NBAA)
Australian Business Aircraft Association (ABAA)
Associação Brasileira de Aviação Geral (ABAG)
Business Aviation Association for India (BAAI)
Business Aviation Association of Southern Africa (BAASA)
EBAA-France (EBAA-F)
Italian Business Aircraft Association (IBAA)
Japan Business Aviation Association (JBAA)
Middle East Business Aviation Association (MEBAA)
Russian Business Aviation Association (RBAA)

Transnational private, industry-based and profession specific organisations:

International Air Transport Association (IATA)
Association of European Airlines (AEA)
European Regions Airline Association (ERA)
European Low Fares Airline Association (ELFAA)
African Airlines Association
Association of Asia Pacific Airlines
Civil Air Navigation Services Organisation (CANSO)
International Business Aviation Council (IBAC)
International Air Carrier Association (IACA)
International Federation of Air Line Pilots' Associations (IFALPA)
Arab Civil Aviation Commission (ACAC)
Airports Council International (ACI)
Airport Association for Benchmarking (TAAB)
Registered Traveler Interoperability Consortium (RTIC)

Others (private regulators):

International Coalition for Sustainable Aviation (ICSA)
International Coordinating Council of Aerospace Industries Associations (ICCAIA)
Canadian Aerial Applicators Association (CAAA)
Airport Association for Benchmarking (TAAB)
Registered Traveler Interoperability Consortium (RTIC)

National aviation authorities:

Airport Management Services Establishment of Algeria
Australian Civil Aviation Safety Authority
Directorate General of Civil Aviation of Ecuador
Japan Civil Aviation Bureau
Dutch Ministry of Infrastructure and the Environment, Inspectorate for Transport, Public Works and Water Management

1.2 Trends and Triggers

The developments in multilevel rulemaking and their links to globalisation have been flagged in quite a few collections of case studies,⁵ monographs⁶ and leading articles by academics.⁷ But, by and large, these brains of global cooperation are not researched intensively. There is a lack of reliable quantitative data. So we have to be careful in drawing conclusions. Still, the existing literature can be combined with the results of research enabled by HiIL and the buzz in our networks. The trends that become apparent from these sources and an indication of the causes that may explain them are listed below:

Trend 1: Rule systems junglify

As early as 1997, Gunther Teubner (HiIL/University of Maastricht Visiting Professor on the Internationalisation of Law in 2009/2010) identified “Global law without a state” showing that international governance often resides in private networks. He wrote about a complex world with many hubs of policy and rulemaking: public, private, national, international.⁸ But we now see another layer of complexity. These rule systems are not isolated producers of rules, but they are intertwined in many ways. Increasingly, rules for one issue come from many directions, creating very complex hybrids of different rule systems. Accounting standards have been set by private bodies and have then made their way into formal legislation. Private networks, like Transparency International, monitor compliance with international – often very open-ended – standards set by international organisations. Cross-border contracts between companies contain clauses leaving conflict resolution to *ad hoc* private arbitration bodies or institutional arbitration tribunals (such as the ICC’s International Court of Arbitration). The International Criminal Court (ICC) cannot enforce arrest warrants without the cooperation of the national police, military and judiciary.

There is competition and there is cooperation in partnerships that have different shapes and sizes. There is soft law and hard law. It is no longer possible to assess “what rule” applies in a human rights case; the answer will always be: many. The 2009 De Larosi re Report, which set the first parameters of the EU (European Union) response to the global financial crisis that broke out in 2008, recommends a mix of international regulatory measures by different bodies – the Basel Committee on Banking Supervision (Basel Committee), an enhanced FSB, the International Monetary Fund (IMF) – and better implementation and coordination at the national level – for example, by national supervisory bodies and regulators – and internal measures that banks, accountants, and credit-rating agencies should take.⁹

Trend 2: Increased demand and supply of international rules, in some places

Globalisation means more travel, more trade and more migration. Many more activities have effects on other countries, so regulation is needed. Standardising and harmonising rules across borders is a way for companies to decrease the costs of serving international markets. A shared interest in improving quality and reliability (and removing competitors with low standards) has led business to develop standards regarding transport, labelling, composition of products, accounting, and financial transactions. In advertising, for example, there was a clear desire to clean the market of dishonest, offensive, indecent practices. So the “demand” for rules at the transnational level is increasing. This is much easier to organise with modern means of communication, so the costs of supplying rules have decreased as well. Fifty years ago, a physical meeting through ambassadors in New York was the best way to get people together around a global challenge. Now, anyone can set up a “UN General Assembly” around an urgent global challenge. These trends explain the enormous growth of transnational regulation that is recognised by every expert in the field.

⁵ T. Hale & D. Held, *Handbook of Transnational Governance, Institutions & Innovations* (2011).

⁶ P. Ghemawat, *World 3.0 Global Prosperity and How to Achieve it* (2010); W. Twining, *General jurisprudence: Understanding Law from a Global Perspective* (2009); J. Koppell, *World Rules Accountability, Legitimacy and the Design of Global Governance*, (2010).

⁷ G. Teubner, *Global Bukowina: Legal Pluralism in the World Society* (1997); P. Schiff Berman, *Global Legal Pluralism*, 80 *Southern California Law Review* 1155, (2007).

⁸ W. Twining, *General Jurisprudence: Understanding law from a Global Perspective* (2009); Mention international literature: B.Z. Tamanaha, *General Jurisprudence of law and Society* (2001), B.Z. Tamanaha, *Understanding legal pluralism: Past to Present, Local to Global*, 30 *Sydney Law Review* 375, at 408 (2008); P. Schiff Berman, *Global Legal Pluralism*, 80 *Southern California Law Review* 1155, at 1190 (2007).

⁹ Retrieved on 23 August 2012 from http://ec.europa.eu/internal_market/finances/docs/de_larosi re_report_en.pdf.

Is this a universal trend? William Twining, a legal theorist writing on globalisation, warns that norms and social relationships are less universal than generally assumed. Indeed, the core rules of civil and criminal law regarding liability, fraud and interpretation of contracts seem to be much more immune to change, although the way they are applied may be rapidly converging. In World 3.0, Pankaj Ghemawat shows that most goods and services still travel over short distances, crossing only one or a few borders, and tend to be exchanged between people speaking the same language. He suggests that the English-speaking parts of the world are experiencing faster integration, which may simply be a matter of lower costs of coordination for a bigger economy of scale. It remains to be seen whether Spanish, Chinese and Arab speaking hubs will be linked to the English ones, or start following their own trajectory.

Trend 3: More concern for others increases demand for global social responsibility

As Steven Pinker noted in his bestselling “The better angels of our nature: Why violence has declined” the circle of people we feel sympathy for is broadening, so more people are concerned with the well-being of others in faraway places, causing a proliferation of human rights rules, environmental regulation and corporate social responsibility guidelines, all aiming to protect people in other countries. Pandemics, terrorism, water-management, rising sea levels, serious human rights violations – cannot be dealt with in national isolation.¹⁰ The values enshrined in many international agreements, expressed by NGOs, and felt by citizens also drive transnational rulemaking through informal networks. Business is learning: a legal licence to operate is not enough; there must also be a social licence to operate. Accordingly, business is now increasingly involved in rulemaking and standard-setting in areas of public interest which were traditionally considered core responsibilities of states: energy and water supply, security services, health, education, environmental protection, and human rights enforcement, to name but a few.¹¹ And if they are not involved, they are quickly pushed to become involved by civil society organisations, states, and international organisations (the UN Global Compact). States face similar pressure: they too, face pressure to go beyond a national law, for example, against war crimes. Action beyond that is expected: investigating, finding and freezing assets of alleged war criminals, even if they are heads of state of another country. This requires operating in informal networks.

Trend 4: Private governance becoming normal: No preference for state-based rulemaking

Experts agree that there is an increase of transnational private governance and regulation: “Coalitions of none-state actors which codify, monitor, and in some cases certify businesses’ compliance with labour, environmental, human rights or other standards of accountability”.¹² According to HiIL researcher Fabrizio Cafaggi, these networks – referred to as transnational private regulatory regimes (TPR) - consist of firms, NGOs, trade organisations, independent experts like technical standard-setters and communities having parallel interests. Some rulemaking is driven by industry interests or NGOs, other networks are stimulated to take action by regulators, ministers, national parliaments or international organisations.¹³ This is no longer about lobbying and influencing; the private networks embark on rule-setting and rule implementation themselves, stimulated by leaders from the public sector.¹⁴ Once there is a sufficient reason to take regulatory action, and a network can be created, there is no reluctance whatsoever to do so. Nobody waits for the state anymore, unless the state clearly is in a better position to take action.

¹⁰ C. Knill and D. Lehmkuhl, Private Actors and the State: Internationalization and Changing Patterns of Governance, *Governance*, 5 (1) *Governance* 41, at 41 (2002).

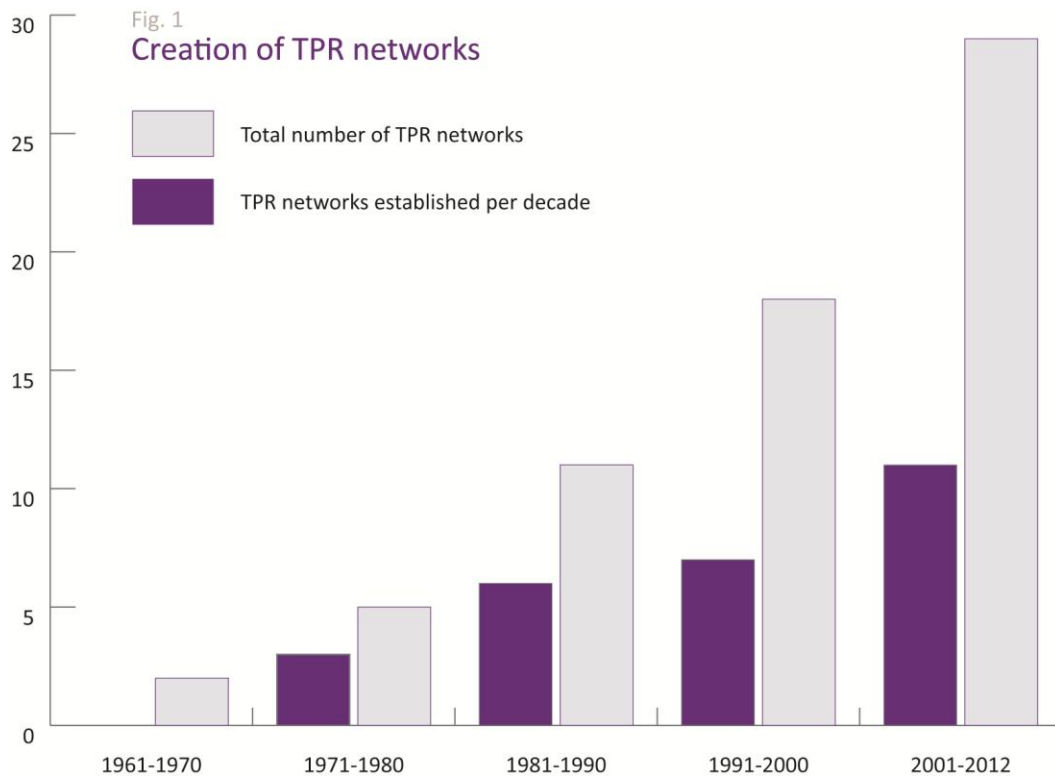
¹¹ Retrieved on 23 August 2012 from <http://www.hiil.org/insight/global-business-and-society-what-about-national-constitutions>; <http://www.hiil.org/insight/new-ways-to-bring-justice-to-communities-and-companies-in-Nigeria>; <http://www.hiil.org/insight/?itemID=563> <http://www.hiil.org/insight/?itemID=563>.

¹² T. Bartley, Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions, 113 *Am. J. of Sociology* 297, at 298 (2007).

¹³ C. Scott, F. Cafaggi and L. Senden, The Conceptual and Constitutional Challenge of Transnational Private Regulation, 38 (1) *Journal of Law and Society*, 1, at 3 (2011).

¹⁴ T. Risse, Transnational Governance and Legitimacy, in: A. Benz, I. Papadopoulos (Eds.), *Governance and Democracy. Comparing National, European and International Experiences*, at 3, (2006).

Private rules are often complemented by public intervention, sometimes leading to multiparty agreements signed by the state as one of the partners.¹⁵ Two leading studies¹⁶ that cover a broad range of TPR networks have been scanned for the date of establishment of TPRs. This revealed (see figure 1) that the number of TPR networks is growing at a rapid pace, especially since the 1990s and 2000s.



Several TPRs do not publish their documents (such as guidelines, standards, recommendations, or protocols) on their websites. In other cases access can only be obtained to such data through their purchase or through formal membership. ISO, one of the most important private rulemakers, is an exception to this rule. Data on standards adopted by ISO reveal that there has been a significant increase in the number of standards issued since the end of the 1990s.¹⁷ Research also points in the direction of an overall increase in rulemaking by transnational private networks.¹⁸

Arguably, the main reason for this trend is the diminishing comparative advantage of national legislation and regulation by international organisations. The notion of national sovereignty – states have the exclusive right to exercise power over their territory – precludes the French parliament from adopting rules that apply in other European states. International organisations have been the answer to this. By the end of the 20th century, the number of Intergovernmental organisations (IGOs) had grown from a handful to more than 2000. But effective regulation needs (1) more expertise than the hierarchical IGO model can organise (more variety in participation), (2) more flexibility than the formal structures allow (more informality), and (3) more speed than the formal IGO structure can produce (faster response times).

¹⁵ F. Cafaggi, *New Foundations of Transnational Private Regulation*, EUI Working Papers, RSCAS 2010/53, at 8.

¹⁶ T. Hale and D. Held, *The Handbook of Transnational Governance: Institutions and Innovations* (2011); HiIL research project *Transnational Private Regulation – Constitutional Foundations and Governance Design*, <http://privateregulation.eu/>.

¹⁷ See <http://www.iso.org/>.

¹⁸ HiIL research project *Transnational Private Regulation – Constitutional Foundations and Governance Design*, <http://privateregulation.eu/>.

Trend 5: Emerging standards for governing the relationships between states and their citizens

Informal rulemaking networks are now also being set up to issue standards for the relations between states and citizens. Unemployment benefits for those losing their jobs because of globalisation, smart tax collection, preventing police corruption, child support after divorce and adequate responses to domestic violence; for each of these issues there are OECD guidelines, protocols suggested by experts or standards developed by international groups of academics.

Every state is now pressured by other states, companies and citizen groups to change its rules in the direction of these best practices. This feels like losing autonomy and being pushed around by Brussels or Washington. Objectively, these are perhaps merely nodes delivering signals coming from all over the world. But people are suspicious about these rules, knowing that private rules are always triggered by the self-interest of those participating, although they require an agreement from which all stakeholders think they can gain.

Trend 6: Rulemaking bodies adapt and compete

IGOs adapted to these needs to some extent. NGOs were given consultative status; around 3500 now have it with the UN. Secondly, international organisations linked up with private rulemaking. The United Nations (UN) Secretary-General set up the Global Compact to involve business¹⁹ and the OECD the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC). Informal co-decision-making arrangements evolved as well.

The ICC Assembly of States Parties and the ICC leadership, for instance, consult widely with NGOs through the Coalition for the International Criminal Court (CICC), up to the point where candidates for judges are interviewed by a CICC panel before they face elections in the Assembly of State Parties, something that is not mentioned in any of the formal documents on which the Court was founded.²⁰

But private mechanisms developed as well, and often provide a better answer to these challenges. Global economic governance today involves the formal-statal IMF, as much as the informal-statal G20 connected with the informal FSB, and the non-statal World Economic Forum (WEF). This can even lead to head-on competition. Jonathan Koppel shows how the ineffective International Tropical Timber Organization (ITTO) was more or less replaced by the Forest Stewardship Council (FSC), in which states have no formal role.²¹

Coordination between competing rule makers?

“Norm-setters such as the International Organization for Standardization (ISO) and GlobalGAP do not coordinate their norm-setting activities. This may indeed lead to conflicting norms and practical difficulties for the users of these norms”.

Standardization Consultant, NEN

Informal governance networks may be able to produce rules faster, because there is no need for the consent of all states, just some form of consensus of members of the network; it has no vetoes and opt-outs, no ratification, referenda or other time-consuming processes at the national level. They can bring in technological expertise, knowhow and clout, from any part of the world and from any organisation. Private rules can also more easily be adapted to new circumstances and demands.²²

¹⁹ Retrieved on 23 August 2012 from <http://www.unglobalcompact.org/>.

²⁰ Retrieved on 23 August 2012 from http://www.coalitionfortheicc.org/documents/CICC_PR_Independent_Panel_31Mar2011.pdf.

²¹ J. Koppel, *World Rule: Accountability, Legitimacy and the Design of Global Governance* (2010), and interview retrieved on 23 August 2012 from <http://www.innovatingjustice.com/blogs/the-accountability-market>.

²² J. Pauwelyn, *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, 1 (2011), available at http://www.hiil.org/data/sitesmanagement/media/Hiil_n23198_v1_IN-LAWIN-LAWIN-LAWIN-LAW_Framing_Paper_Pauwelyn_June_2011.pdf, quoting the U.S. National Security Strategy of 27 May 2010.

Trend 7: Regulation through contracts

One of the primary ways transnational private governance is extending its reach is by the use of supply chain contracts. These have become important tools to uphold international standards in the area of human rights, labour law, and the environment. A company that has committed itself to these standards commits its suppliers to them as well and demands that its suppliers also commit the subcontractors it uses.

Trend 8: Unilateral policies and commitments

Companies and other actors unilaterally placing on their website commitments to certain standards is also increasing. In 2010 Unilever published its Sustainable Living Plan (www.unilever.com/sustainable-living/uslp), with around 60 targets relating to health, food, the environment, etc. Since it publishes regular reports on how the plan is being implemented. Nestlé publishes the Nescafé Plan, containing its commitments regarding responsible farming (www.nescafe.co.uk/sustainability_en_co_uk.axcms). Partly, this is a cost-effective reaction to being regulated by so many different rules. A multinational company standardises its compliance system by adhering in all countries to the most stringent rules that are set by any relevant state in which they operate. But these commitments are also part of a clear trend to strengthen key relationships. Customers, shareholders and the communities in which companies operate are given an explicit statement about the qualities they can expect.

Trend 9: Dramatic stagnation of international treaty-making

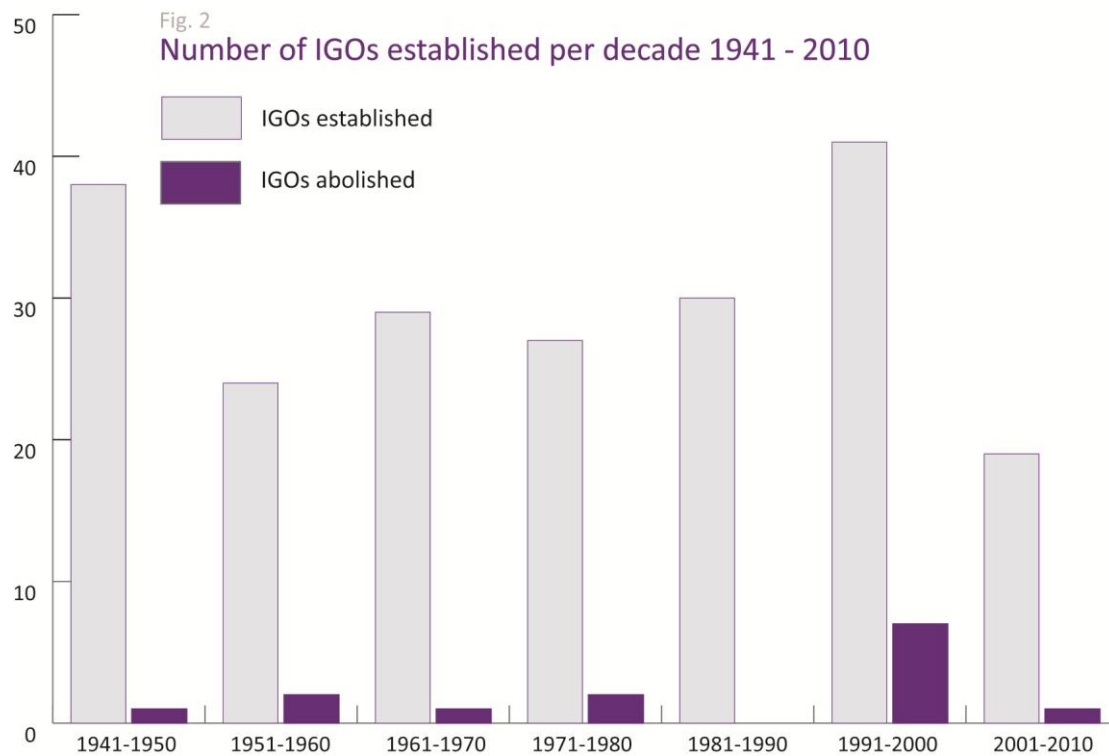
During the previous century the number of IGOs grew from a handful to more than 2000. By the year 2000 around 3,000 multilateral and 27,000 bilateral treaties had been registered with the UN.²³ But Joost Pauwelyn, leading one of HiIL's research projects, found that international law is losing ground. "For each decade since the 1950s, the number of new multilateral treaties deposited with the UN Secretary General was around thirty-five. In the ten years between 2000 and 2010, this number dropped quite dramatically to twenty (in the preceding five decades it had never been below thirty-four). Between 2005 and 2010, only nine new multilateral treaties were deposited (in 2011, not a single one). The broader UN Treaty Series database confirms this downward trend as of the 2000s, both for bilateral treaties (12566 concluded in the 1990s; only 9484 concluded in the 2000s) and multilateral treaties (406 entries in the 1990s; down to 262 in the 2000s)".²⁴ The treaties abolishing landmines in 1997 and establishing the ICC in 1998 may be the latest treaties that really impressed the general public. Treaty negotiations regarding the Kyoto Protocol and the Doha Round are among the most salient failures of the treaty-making mechanism.

The downward trend is not limited to multilateral and bilateral treaties, however. We have consulted a number of sources that contain an historic overview of the establishment and abolishment of IGOs,²⁵ which revealed a decrease in the establishment of new IGOs over the years 1941-2010 (see fig. 2), in particular since the 2000s. This is in sharp contrast with the development in the establishment of TPR networks (see fig. 1, above) and informal international lawmaking (IN-LAW) networks (see fig. 4, below).

²³ UNTS Database.

²⁴ J. Pauwelyn, *The Stagnation of International Law*, 2, (2012) (forthcoming).

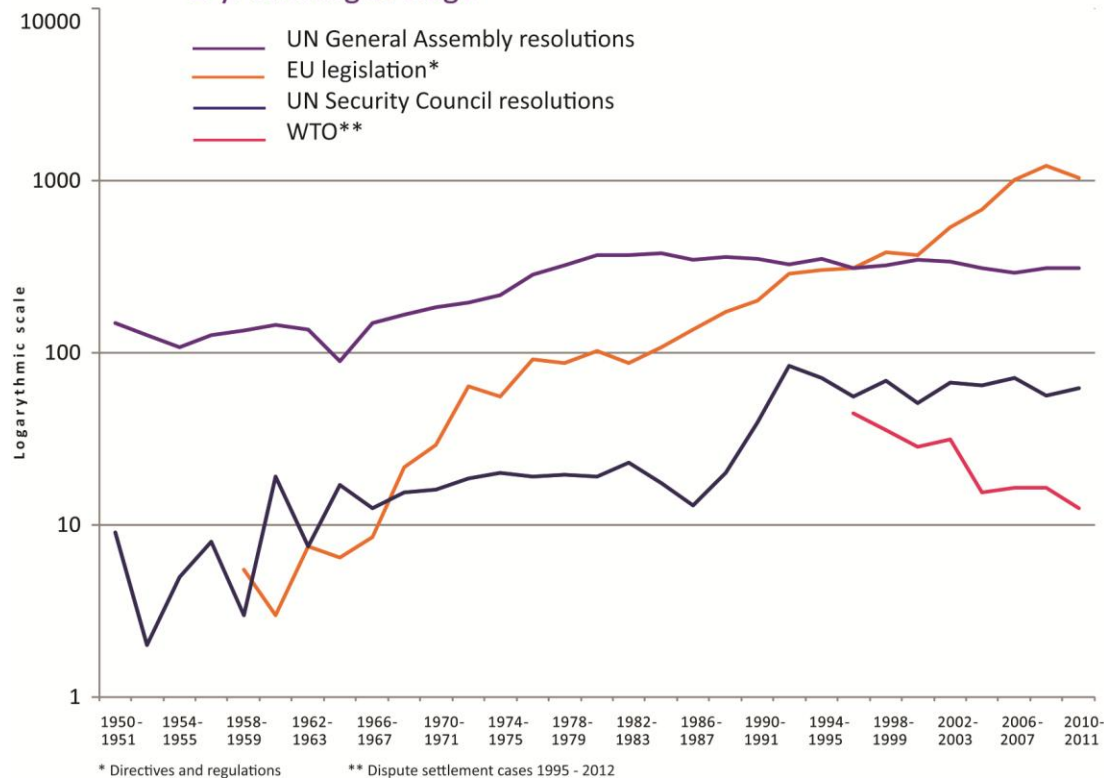
²⁵ E.g. H. G. Schermers and N. M. Blokker, *International Institutional Law* (2011); CIA, *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/appendix/appendix-b.html>; <http://libguides.northwestern.edu/IGO>.



What about decision-making by IGOs? We consulted the websites of a number of IGOs and counted the number of decisions taken by these organisations or their organs.²⁶ Figure 3 shows that the number of decisions per year by the UN Security Council and the UN General Assembly in the period 1990-2011 remained roughly on the same level, with a drop in WTO decisions in recent years. A sharp increase in decisions is noticeable in regard of the EU since the 2000s, which can be explained on the basis of the increase of EU powers in different fields as a result of the Treaty of Nice (2001) and the Treaty of Lisbon (2007) and the increase in EU member states.

²⁶ For EU legislation (regulations and directives), see - http://eur-lex.europa.eu/RECH_legislation.do; for UNSC resolutions, see <http://www.un.org/documents/scres.htm>; for UNGA resolutions, see <http://www.un.org/documents/resga.htm>; for WTO judgments, see http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results.

Fig. 3
Decision-making selected IGOs 1950 - 2011
2-yr running average



In addition, IGOs sometimes move away from formal international law as a way to set rules. With the Global Compact, the UN reaches out to business in relation to guaranteeing human rights, labour, environmental, and anti-corruption standards.²⁷ The Rio+20 conference ended with an Outcome Document containing the agreement between the UN member states, but also a long partnership register and a long list of voluntary commitments by non-state parties.²⁸ The overall picture is, therefore, a significant stagnation in the development of public international law.

Trend 10: Informal international law-making

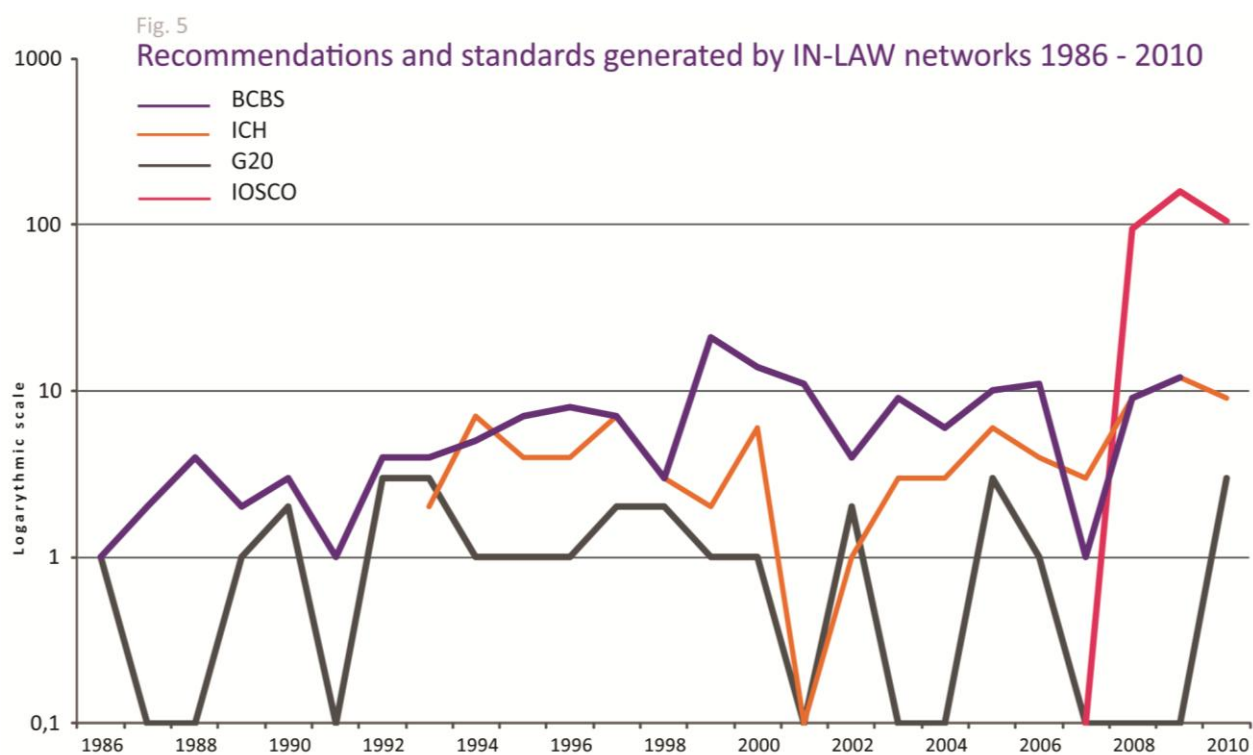
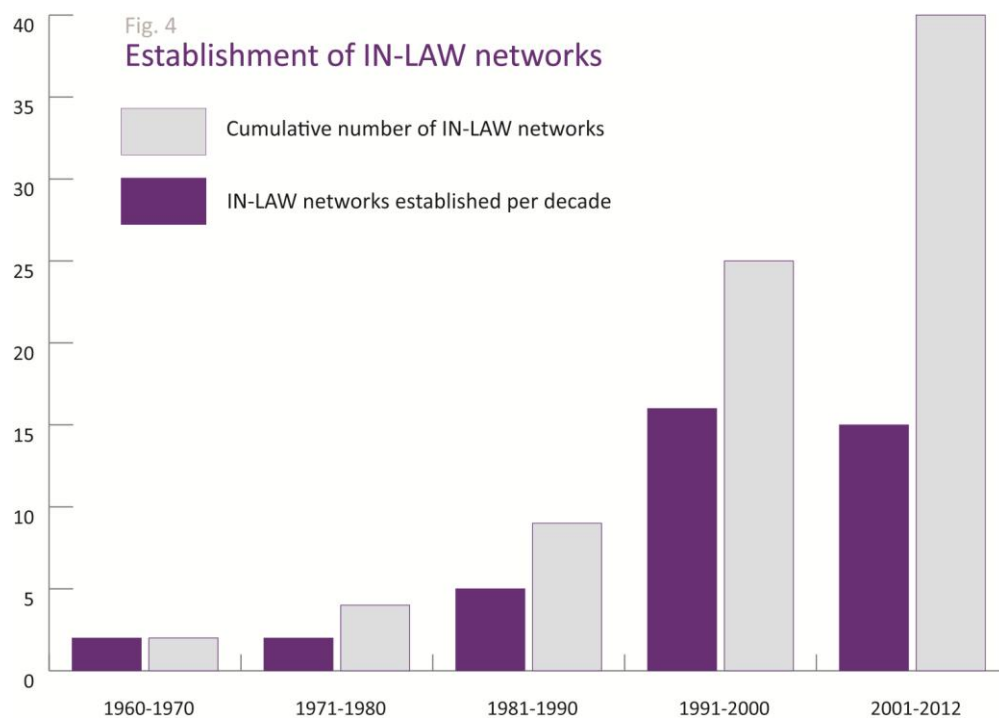
Two leading studies²⁹ that cover a broad range of IN-LAW networks have been scanned for the date of establishment of IN-LAW networks. This revealed that, instead of IGOs and treaties, there is a general increase of IN-LAW networks (see figure 4), leading to an increasing number of guidelines, standards, declarations and informal policy coordination or exchange (see figure 5).³⁰ It does not occur within formal structures but in loosely organised networks. The G-20, the BSBS or the FATF have emerged as new hubs of power. These networks may, of course, have a secretariat, a headquarters, and internal rules on voting, agenda-setting and the like, but none of this is based on a formal treaty or formal decisions from parliaments. They are flexible in terms of membership, not dominated by diplomats, but including a broad variety of representatives from ministries, domestic regulators, independent and semi-independent agencies, judges, legislators, NGOs and businesses. They are more fluid, more process-based and are less of an organisation.

²⁷ Retrieved on 23 August 2012 from <http://www.unglobalcompact.org/>.

²⁸ Retrieved on 23 August 2012 from <http://www.unctd2012.org/thefuturewant.html>.

²⁹ T. Hale and D. Held, *The Handbook of Transnational Governance: Institutions and Innovations* (2011); HiIL research project *Informal International Lawmaking*, <http://www.hiil.org/project/informal-international-law-making-and-accountability>, in particular J. Pauwelyn, J. Wouters and R. Wessel (eds.), *Informal International Law-Making: Case Studies* (2012) (forthcoming).

³⁰ For IOSCO, see <http://www.iosco.org/>; for ICH, see <http://www.ich.org/products/guidelines.html>; for the BCBS, see http://www.bis.org/list/bcbs/from_01012010/index.htm. The data for the G20 include the 'Commitments' made in Declarations and Annexes adopted during G20 Summits. See, e.g., <http://www.g20.utoronto.ca/analysis/commitments-10-toronto.html>.



The International Conference on Harmonization of Technical Requirements for the Registration of Pharmaceutical Products (ICH)

The ICH was set up in 1990, and is composed of drug regulatory authorities and Research and Development pharmaceutical industry associations (i.e. industry dealing with the development of new drugs) from the US, EU, and Japan. Certain observers and private interested parties may attend meetings, too, such as the World Health Organization (WHO), Swissmedic (the Swiss drug regulator) on behalf of EFTA countries, Health Canada, or the International Generic Pharmaceuticals Alliance (IGPA). The purpose of the ICH is to harmonise the technical requirements of drug registration rules concerning the quality, efficacy, and safety of drugs between its member countries.

The ICH is not a classical multilateral organisation and operates outside public international law. It has no founding treaty, and it does not issue binding regulations. Rather, its main function is to act as an informal forum to make recommendations (standards, guidelines) towards achieving greater harmonisation in the interpretation and application of technical guidelines and requirements for pharmaceutical product registration.

As observed by Ayelet Berman: “ICH guidelines are considered de facto global standards and are being adopted by many countries that are not members to the network. Producers in non-member countries also follow them (irrespective of whether the country adopted them). From a business perspective the decision to follow ICH guidelines is quite straightforward: In order to gain access to the global pharmaceuticals market, which is dominated at around 90% by ICH countries, outsiders must also follow their standards. [...] Even developing countries that are not export-oriented adopt or rely on ICH guidelines. They are wary of being accused of producing substandard pharmaceuticals [...].”³¹ While ICH guidelines were initially intended for new drugs, quality-related guidelines are now also regularly used for generic drugs. As a result ICH guidelines now also affect the generics industry (which is not participating in the ICH) which is particularly important for developing countries since most drug-production taking place there is that of generics. However, the ICH standards raise manufacturing costs and are too costly for smaller pharmaceutical companies, and producers of generic drugs in developing countries with adverse effects on the availability of generic drugs to the local population.

Thus, the standards issued by the ICH have a far-reaching impact, also for states that are not represented. There is no direct accountability to political actors. Participation is limited to a few key actors. No move has been made to change that status.

Trend 11: More ways to enforce rules

Besides rulemaking, we also see a proliferation of informal enforcement, dispute resolution and adjudication. Linked to the informal and private rulemaking come combinations of formal and informal enforcement mechanisms, ranging from courts of law, to supervision by government agencies, administrative procedures, internal complaint processes within corporations, the blaming and shaming by NGOs, scrutiny by the press and informal dispute resolution. There is a general trend from formal sanctions towards a compliance policy based on incentives.³²

³¹ A. Berman, *The Role of Domestic Administrative Law in the Accountability of IN-LAW: The Case of the ICH*, in J. Pauwelyn, R. Wessel & J. Wouters (Eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, Chapter 22, (2012) (forthcoming).

³² A van Aaken, *Trust, Verify or Incentivize? Effectuating Public International Law Regulating Public Goods Through Market Mechanisms*, 104th Proceedings of the American Society of International Law, 153-156 (2011.).

Corruption, for instance, is combated by a mixture of public international,³³ regional (for example, the Advisory Board on Corruption of the African Union),³⁴ national (national anti-corruption agencies, prosecutors), NGO-driven (for example, the Transparency International Corruption Perceptions Index),³⁵ and self-regulatory regimes (disclosure) enforce the rules.

Trend 12: A more innovative market for institutions and procedures

This all adds up to more options, more knowledge and more competition. There is now unprecedented access to knowledge about legal principles, notions, case law, examples of good and bad laws. There are countless forums, mechanisms, systems, successes, and failures that someone with a challenge can learn about and use. There is a proliferation of legal information services. All this has created a huge “market” of ideas and regimes that go through trial and error processes, which compete, interact, fail, succeed, etc. There is a lot of choice out there, coupled with a lot of voice, which, if needed, can create even more choice.

We should not forget that private rulemaking has always existed (think of the famous “lex mercatoria”). But during the past decades, the institutional capacity to make private rules has grown enormously, with hundreds and hundreds of rulemaking bodies appearing on the scene and a proliferation of new rulemaking procedures. Parallel to this, a new support industry of regulation and compliance expertise is developing. Certification and monitoring is now a major business in itself. Some international companies report a growth in recruitment of compliance officers (who verify commitments in supply chains) and a reduction in the amount of lawyers.

1.3 Aims of this Report

A need for innovative means of legal governance

These trends undeniably show that multilevel, private and networked rulemaking is there to stay, changing the (global) legal environment rapidly. Thought leaders have expressed very diverse views on globalisation, but tend to agree that law has an important role to play. They tend to encourage innovation, because the present ways of legal ordering are not always sufficiently effective. In World 3.0, management guru Pankaj Ghemawat argues that opening up is generally beneficial for countries and regulation is an important element of increased integration of the world’s economies. On a more alarmist note, Pareg Khanna writes that we have entered into a chaotic modern era that resembles the Middle Ages, with Asian empires, Western militaries, Middle Eastern sheikhdoms, magnetic city-states, wealthy multinational corporations (MNCs), elite clans, religious zealots, tribal hordes, and potent media. He puts his faith in new networks among governments, businesses, and civic interest groups to tackle the crises of today and avert those of tomorrow.

What is needed to enhance multilevel rulemaking?

Is multilevel rulemaking, as it has developed, ready to take up these challenges? Legal theorist William Twining stays on the safe side and wants lawyers to think more about their concepts before pretending they can tackle cross-border issues. The gurus of global ordering urge that innovation is still needed. In this report, we try to assess whether this expectation is realistic, and to establish priorities for innovation, from an overall perspective of how to ensure trust in multilevel rulemaking.

³³ 2004 UN Convention Against Corruption, GA Res 58/4 (2003) retrieved on 23 August 2012 from http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

³⁴ 2003 African Union Convention on Preventing and Combatting Corruption, Article 22, http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf.

³⁵ Retrieved on 23 August 2012 from <http://cpi.transparency.org/cpi2011/>.

Focus on rulemaking rather than policy-making

This report covers the topic of multilevel rulemaking. But how does this relate to policy-making? The textbook model is one in which a decision is first made on policy, after which it is decided whether, and if so how, that policy will be supported by rules and standards. The distinction is important because the requirements for policy-making are not necessarily the same as the requirements for rulemaking. This Trend Report focuses on rulemaking, not on policy-making and the broader notion of governance. Having said that, the two are not always easy to separate. The reality is often that when broad policies are translated into rules, new policy issues emerge. Moreover, the effectiveness of rules cannot easily be separated from the quality of the underlying policies. If rulemaking processes fail a fundamental disagreement about policy objectives may very well be the underlying reason.

Focus on two forms of international rulemaking

Second, the report focuses on two forms of transnational governance by networks: informal international lawmaking (IN-LAW) and transnational private regulation (TPR). There is considerable overlap between these two forms of transnational governance. These regimes are transnational, rather than international, in the sense that their effects cross borders, but are not constituted through the cooperation of states as reflected in treaties. The difference is that IN-LAW is dominated by public actors whereas TPR is dominated by private actors.

1. Informal international lawmaking

IN-LAW is not traditional international law for three reasons. First, it does not lead to a formal treaty or any other official source of international law. Its output are guidelines, standards, declarations or even informal policy coordination or exchange. Secondly, it occurs in a loosely organised network rather than a traditional international organisation. Think of the G-20, the BCBS or the FATF. These networks may have a secretariat, headquarters, and internal rules on voting, agenda-setting and the like. But all of that is not based on a formal treaty. Moreover, these IN-LAW networks are flexible in terms of membership and procedures. They are processes rather than fixed entities. Thirdly, those active in such networks are not traditional diplomatic actors, but a wide variety of representatives from ministries, domestic regulators, independent and semi-independent agencies, judges, legislators, NGOs and business.

2. Transnational private regulation

TPR, on the other hand, refers to governance regimes, which take the form of “coalitions of non-state actors which codify, monitor, and in some cases certify businesses’ compliance with labour, environmental, human rights or other standards of accountability”.³⁶

“Transnational Private Regulation [...] constitutes a new body of rules, practices and processes, created primarily by private actors, firms, NGOs, independent experts like technical standard-setters and epistemic communities, either exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation”.

Fabrizio Cafaggi

³⁶ T. Bartley, Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions, 113 Am. J. of Sociology, 297-352, at 298 (2007).

TPR is “private” in the sense that the key actors in the regimes include business (both individually and in associations) and civil society or non-governmental organisations (NGOs).³⁷ TPR implies the direct involvement of private actors in rule-setting and rule implementation processes and should therefore clearly be distinguished from lobbying or influence-seeking activities of private actors.³⁸ TPR encompasses numerous regimes including labour rights, human rights, the environment, health, trade, and transport. Some are mainly driven by industries; some are promoted by NGOs; others by the joint endeavour of industry and NGOs, often complemented by public intervention, giving rise to tripartite or multiparty agreements.³⁹ Examples include the International Accounting Standard Board (IASB),⁴⁰ GLOBALG.A.P.,⁴¹ the UN Global Compact,⁴² IATA, ISO,⁴³ and Internet Corporation for Assigned Names and Numbers (ICANN).⁴⁴

What follows: Challenges and ways to overcome them

In the following, we focus on six major challenges. We start from the perspective of the rule of law, economics of regulation and a very pragmatic “what works” for citizens and corporations (Chapter 2). Based on this, we then investigate to what extent participation and transparency can be guaranteed, whether accountability and conflict resolution are an issue, and whether compliance and effectiveness of informal and private international rulemaking needs to be improved. Besides assessing the challenges, we show how transnational rulemaking networks are already trying to overcome them. We identify innovative approaches that are proposed to remedy these challenges. Exploring whether these tools are likely to be sufficient to do the job, we come to the priorities: the main issues for which more innovation is needed (Chapter 3).

Implications for strategy and working methods

Chapter 4 deals with the strategic implications of these trends for institutions and professionals in the justice sector. Parliamentarians, directors of legislative departments of national ministries, legal counsels working for multinational companies, judges and lawyers, and justices in highest courts have to cope with the trends in multilevel rulemaking. What is the impact on their current working methods and do they have to develop new strategies?

Trust, the national state and the future of rulemaking

Chapter 5 revisits the findings in the previous sections in the light of three crucial questions:

- Can citizens and business trust multilevel rulemaking and what are indicators of possible trouble?
- What is the role of the institutions of the national state in the setting of multilevel rulemaking and how can they adapt?
- What can be the role of an emerging international rulemaking profession?

³⁷ C. Scott, F. Cafaggi and L. Senden, The Conceptual and Constitutional Challenge of Transnational Private Regulation, 38(1) *Journal of Law and Society* 1-19, at 3 (March 2011).

³⁸ T. Risse, Transnational Governance and Legitimacy, in A. Benz, I. Papadopoulos (Eds.), *Governance and Democracy. Comparing National, European and International Experiences*, (2006), at 3.

³⁹ F. Cafaggi, *New Foundations of Transnational Private Regulation*, EUI Working Papers, RSCAS 2010/53, at 8.

⁴⁰ The IASB produces International Financial Reporting Standards (IFRS), which are subsequently adopted by business to comply with requirements expressed by Stock Exchanges, the Financial Stability Board and other entities. See <http://www.ifrs.org/Home.htm>.

⁴¹ GLOBALG.A.P. is a partnership of private actors, that produces international food safety standards to be applied along the supply chain by suppliers and retailers. See http://www.globalgap.org/cms/front_content.php?idcat=4. And see F. Cafaggi, *New Foundations of Transnational Private Regulation*, EUI Working Paper RSCAS, 2010/53, p. 10.

⁴² The UN Global Compact consists of firms voluntarily agreeing to comply with international human rights and environmental norms. See <http://www.unglobalcompact.org/>.

⁴³ ISO is the world's largest developer and publisher of International Standards. ISO is a network of the national standards institutes of 164 countries, one member per country, with a Central Secretariat in Geneva, Switzerland, that coordinates the system. ISO is a non-governmental organisation composed of business and institutes that are part of the governmental structure of their countries, or are mandated by their government.

⁴⁴ ICANN regulates the internet, but is a non-governmental institution. See <http://www.icann.org/en/about>.

1.4 Data Used and Methodology

Research projects regarding new forms of international regulation

The present report is based on the results of 10 research projects that have been commissioned by HiIL to study the impact of globalisation on the national state.⁴⁵ They have been carried out in the past 5 years by research groups that have been selected because of their specific expertise in the field of transnational regulation and informal rulemaking. The research questions in these projects, as well as the papers, edited volumes and books produced by the researchers, can be found on HiIL's website.⁴⁶

Law of the future scenarios and think pieces

Moreover, HiIL collected 49 "Think Pieces" in 2010/2011 and another 60 in 2011/2012. Many of the greatest minds and thought leaders in the field of the rule of law agreed to reflect on the future of law in their area of work. In up to 3000 words, each of them explored the trends in rulemaking, compliance and conflict resolution. Almost every author at least touched on the challenges of multilevel rulemaking, generating a broad variety of perspectives.⁴⁷

Invaluable insights have also been obtained from 14 scenario feedback workshops held in four continents, and a Law of the Future conference at the Peace Palace in The Hague. This process has led to four scenarios for the global legal environment of the future, which helped us to use different perspectives and to prevent a tunnel vision on multilevel rulemaking.⁴⁸

Interviews

Very useful input for this report was generated through interviews on law and globalisation and the impact of multilevel governance conducted with 16 directors of research institutes, court presidents, general counsels of multinationals and legal advisors of regulatory agencies and ministries. These interviews were conducted both as part of the Law of the Future Scenarios and the drafting of this report.⁴⁹

Networks and conferences

Data and trends have also been spotted at the meetings of the Innovating Justice, Rule of Law and Law of the Future networks that HiIL has facilitated during the past 6 years. We also benefitted immensely from participating as panellists, contributors, speakers or chairs in the Global Agenda Council on the Rule of Law of the WEF, the World Bank Global Justice and Development Week, various committees of the International Bar Association, the work of the UN Commission on Legal Empowerment of the Poor, meetings of the International Law Association, the World Justice Forum and many ad hoc seminars organised by other organisations.

Literature review

These data have been enhanced and put into perspective by the international research literature. It is impossible to cover the vast literatures of every sub-discipline that are relevant for multilevel rulemaking, so our focus has been on the literature on legal pluralism, economics of rulemaking, multilevel rulemaking, multilevel governance, accountability, rule of law and justice sector innovation.

⁴⁵ The Internationalisation of Rule of Law – Changing Contexts and New Challenges; Measuring Access to Justice in a Globalising World; Private Transnational Regulation: Constitutional Foundations and Governance Design; National Resistance against the Europeanisation of Private Law; The Changing Role of Highest Courts in an Internationalising World; National Judges as European Community Judges; Informal International Lawmaking; National Constitutional Law in a Globalising World; General Rules and Principles of International Criminal Procedure; Convergence and Divergence of National Legal Systems; see www.hiil.org/projects for results and publications.

⁴⁶ Retrieved on 23 August 2012 from www.hiil.org.

⁴⁷ See S. Muller, S. Zouridis, M. Frishman and L. Kistemaker (eds.), *The Law of the Future and the Future of Law*, (2011). Available at <http://www.ficli.org/publication-series/>.

⁴⁸ HiIL, *Law Scenarios to 2030*. . Available at

[http://www.hiil.org/data/sitemanagement/media/HIIL_n21837_v1_Law_Scenarios_to_2030_v2\(2\).pdf](http://www.hiil.org/data/sitemanagement/media/HIIL_n21837_v1_Law_Scenarios_to_2030_v2(2).pdf).

⁴⁹ See List of Contributors, page 81

Process

In the run-up to this report, we proceeded as follows:

- We identified potential trends, challenges and approaches from HiiL research;
- Connected them to findings from the think pieces and other data sources;
- Conducted interviews with a selected group of practitioners;
- Worked towards a first draft, using the “scrum” method for agile, interactive development of products, as used in the IT-sector;
- Organised a dialogue with HiiL’s programmatic steering board and small groups of experts;
- Asked the project leaders to comment on the first draft;
- Produced a second draft.

2. How to Assess Multilevel Rulemaking?



Assessing private and informal rulemaking is not easy, because so many different perspectives are possible. In line with Hiil's mission, our main criterion is whether multilevel rulemaking works for people and their organisations. But that is a question similar to whether Facebook works or whether international aviation networks satisfy our flying needs. So we had to focus on particular issues.

In Chapter 3, we ask seven basic questions about the impact of rulemaking as it is developing (more private, more international, more interaction between various rule makers). We start (1) with exploring the opportunities for citizens and companies created by these trends. Then we move to the (2) challenges in relation to participation by all people and organisations impacted, (3) transparency of the process of regulation, (4) accountability for the output and outcomes, (5) dispute settlement and litigation, (6) compliance, and (7) effectiveness in terms of achieving the objectives of regulation. Besides investigating challenges, we also discuss the ways those involved in rulemaking are trying to overcome them. These questions are based on three perspectives.

2.1 Rule of law safeguards

Although ideas about the extent to which governance should be based on rules are widely debated, every country in the world has an extensive body of rules regulating behaviour. Rule of law safeguards have emerged that prescribe how "good" rules can be made. The World Justice Project has a useful definition of rule of law in its *Rule of Law Index*. It has four components:⁵⁰

1. The government and its officials and agents are accountable under the law.
2. The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

Accountability, participation and transparency

Accessibility of a rulemaking process implies some form of *participation* by those that are affected by the rules. Processes in which people are also involved are seen as more fair and that in turn leads to increased legitimacy, so participation is an important benchmark for rulemaking processes. But in international settings, it is much more challenging to organise this in an efficient way. The state and its institutions are now only one of the many possible participants in the process.

Accessibility and accountability also imply that the process preferably is *transparent*; ideally, it must be visible what is being done, what process is being followed, who participates, and what information is being used to determine the rulemaking strategy (input or process accountability). But how can all those potentially affected by transnational rulemaking know that a rulemaking effort is under way? Why and how should rulemaking networks reach out to everybody? The rule of law perspective also requires that the rule maker is accountable for the *output* of the rulemaking process. This is also termed output or forum accountability, which includes evaluation, complaint and response mechanisms. What output accountability was applied to the international financial services sector and the rules on which its pre-2008 business practices were based?

⁵⁰ Retrieved on 23 August 2012 from http://www.worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf.

HiIL Research Project | The Internationalisation of the Rule of Law: Changing Contexts and New Challenges

Professor André Nollkaemper, Professor Randy Peerenboom, Professor Michael Zürn

The nature, objectives, and effects of rule of law promotion are undergoing major transformations as a result of the increasing international and transnational dimensions of governance. Contemporary rule of law promotion has become internationalised in two additional senses. First, although not yet a norm of international law, there is a growing normative expectation that states need to comply with basic rule of law principles. Second, the rule of law agenda has increasingly targeted IGOs and transnational actors such as business to comply with basic rule of law principles. IGOs and donor states have been criticized by recipient countries for their own failures in rule of law compliance, undermining the legitimacy and effectiveness of rule of law programmes.

The major players in rule of law promotion (IGOs such as the World Bank (WB), EU and the United Nations Development Programme (UNDP), and Western states) have not yet, or insufficiently, altered their strategies, programmes and practices to reflect the shift to new levels and new forms of governance and the varying needs and capacities of recipient countries, leading to poor results in increasing the level of rule of law on a global scale. NGOs, on the other hand, appear to increasingly involve local actors in their rule of law promotion efforts.

This is the outcome of the first phase of a research project on the underlying causes for poor results in the promotion of the rule of law. The researchers studied relevant literature and current practice (WB, UN, EU, several donor and recipient states) through the perspective of “rule of law dynamics”, which refers to the increasing international and transnational dimension of rule of law promotion, the interaction between the international and domestic level, the interaction between rule of law promotion (donor strategies) and rule of law conversion (the ways it is promoted and the ways it is received), and the relevance of rule of law diffusion (the modalities that cause the spread of expectation that one complies with the rule of law). Both literature and practice pay too little attention to the recipient’s perspective and needs (failures in rule of law conversion) and its effect on the success of programmes. One-size-fits-all programmes, top-down strategies, transplants by developed states of their own rule of law standards without the capacity of the recipient to cope with them, are still principal features of today’s rule of law promotion efforts. Almost no attention is paid in literature and practice to rule of law diffusion, i.e. the diffusion of the applicability of the rule of law to e.g. IGOs and the resulting lack of legitimacy. Contemporary rule of law promotion strategies should therefore be based on an understanding that rule of law promotion, conversion and diffusion are inextricably linked.

The second phase of this project will build on the conclusions reached during the first phase and focus on 1) the causal mechanisms that lead states, IGOs and other transnational actors to adopt and comply (with variations) with rule of law principles, 2) assessing emerging minimum standards of rule of law at both the international and national level through the study of their interaction and 3) the recipient perspective in particular in middle-income countries.

Effectiveness

Next, a rule of law perspective requires that *dispute resolution mechanisms* and *access to justice* are available. Litigation in courts and other ways to solve disputes can become more complicated if rules come from different directions. *Compliance* is a key factor for any rule system: rules must be enforced, either by legal sanctions, or by other ways to motivate people to behave in the desired way.⁵¹

⁵¹ On market mechanisms for effectuating public international law (but also hybrid regulatory systems), see, A. van Aaken, Effectuating Public International Law Through Market Mechanisms?, 165(1) Journal of Institutional and Theoretical Economics, 33-57 (2009). On market mechanisms for effectuating international public goods, see, A. van Aaken, Trust, Verify or Incentivize? Effectuating Public International Law Regulating Public Goods Through Market Mechanisms, 104th Proceedings of the American Society of International Law, 153-156 (2011).

Compliance should be fair, which means that the rule must be applied in the same way to the same cases. It must also be done efficiently; enforcement must not take too long or cost too much. Here, too, going beyond the nation state paradigm presents serious challenges.

All important interests protected

We will not assess directly whether multilevel rulemaking impacts *fundamental rights*, which are integrated in many ways in the flexible, multilevel, partly private, partly public and very interactive global law system. When discussing *effectiveness* the main issue will be whether the interests to be protected by the rules are indeed advanced. Security of persons and property, and every interest protected by fundamental rights, is often one of the goals behind international and private rulemaking. A crucial condition for a good regulatory regime is the taking into account of the interests of all those who might be affected by the regime. A regulatory regime that merely serves the interest of one or a few parties, neglecting the issues important to others, is bound to fail in the long run.

Fairness in distributive issues

But rules are certainly used to advance private interests and many of them imply that burdens or gains are shared in a certain way. Between customers and suppliers, between incumbents and new entrants to the market, or between generations. Although companies more and more subscribe to the triple bottom line "People, Planet, Profit", their main short- and mid-term interest is to satisfy shareholders. Business interests are often well-represented in networks regulating public interest issues across borders (safety, environment, labour standards) in respect of which national states and IGOs have very limited control.

For all these reasons, the literature is arguing for development of minimum rule of law standards, suitable for these issues.⁵² This is sometimes referred to as the constitutionalisation of private norm-setting.⁵³ The threat of favouring one's own interests over the public interest is an often heard concern regarding norm-setting by private actors. It is, however, also relevant to states advancing the interests of their nationals or their leaders, both when they set public norms and when their public officials participate in informal transnational networks.

The unexplored terrain beyond the nation state

But for the general public the confusion is even more prominent. Gradually, people became accustomed to the idea of the nation state as a way to be governed. Rule of law safeguards grew out of the nation state and are closely intertwined with that concept: people that organise their lives within the state-unit. So, even though rule of law governance principles are not applied in the same way everywhere in the world, people generally know what the governance principles are and how the rulemaking works within that state. In the course of the past century mechanisms were also developed to apply rule of law safeguards to rulemaking between states: treaties. That system is far from perfect (allegations of a "tyranny of the executive" frequently emerge), but it is possible to envisage how accountability, participation, and transparency can be organised at this level as well. Going beyond the state as the main source of authority and organisation, however, truly confronts most people with something that looks like dark and suspicious matter. A small elite knows what goes on, and some people see the positives of these new ways of being governed. But for most people on the globe the perspective is perhaps rather more frightening: What happens out there in that unknown territory where people do not speak my language?

⁵² Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*. Oxford and Portland: Oregon: Hart Publishing (2005).

⁵³ See the HiIL project *Private Transnational Regulatory Regimes – Constitutional Foundations and Governance Design*, led by Fabrizio Cafaggi, at <http://privateregulation.eu/>. See also the book by the HiIL Visiting Chair on Internationalisation, Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012).

2.2 Economic analysis of rulemaking failure

Economists have analysed rulemaking from a great many theoretical perspectives, and tested these theories in empirical studies. For economists regulation should always be justified by “market failure” and the cure should not be worse than the disease. And they also show how rulemaking is driven by private interests as well as by a desire to solve the problems.

Justifications for regulation

The mainstream literature offers the following justifications for regulation a) lack of competition, most prominently monopoly; b) information problems, most importantly asymmetric information (but including also uncertainty, bounded rationality, and different attitudes to risk); c) missing markets, including both negative externalities (damage to third parties) and public goods (benefits for third parties which cannot be recouped).⁵⁴ When we discuss *opportunities*, we will see to what extent these problems can be better addressed by private, international and informal rulemaking.

Regulation failure

Whether the regulation actually improves the situation typically depends on a comparison with the alternatives: doing nothing, or leaving the issues to law suits under private law, for instance. The main issues to look at in this respect are the administrative costs of making and applying rules, and the probability of regulatory failure. The two main causes of errors in rulemaking and applying rules are: a) insufficient information among the officials responsible for the regulation about behaviour of firms and individuals or the effects of rules; b) failure of regulators to also serve the public interest, because they give precedence to very specific interests only.

Insufficient information

So the first question is whether rule makers have better information in the new setting of private transnational regulation and informal public networks. Better information is likely to make rules more *effective*. Getting this information can be difficult, in particular in relation to technical standard-setting where knowledge is concentrated in the private sector.

Regulatory capture, group size and participation

The other main cause of regulatory failure is often linked to regulatory capture. Mancur Olson, Stigler, and many others following in their footsteps, have shown that the clout of interest groups critically depends on the size of the affected group and on the size of the stakes in the regulation.⁵⁵ A small group of organisations (such as major businesses) with a big stake each can easily organise a powerful lobby. A large group of individuals (such as employees, consumers, citizens) in which each person is only marginally affected by the regulation is much more difficult to organise. Only a small proportion of them will contribute to a trade union or a consumer organisation through membership, for instance, and many others will be free riders. So *participation* may have to be organised much more actively by designing procedures that enable the interests of citizens, consumers, employees, owners of small businesses, women or the poor (to name a few large groups) to be voiced effectively.

⁵⁴ A. Paccès and M. Van den Bergh, An Introduction to the Law and Economics of Regulation (2011). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914417.

⁵⁵ M. Olson, The Logic of Collective Action (1965); G.J. Stigler, The Theory of Economic Regulation, 2(1) Bell J. Econ. Man. Sci. 3-21 (1971); J.J. Laffont and J. Tirole, The Politics of Government Decision Making. A Theory of Regulatory Capture, 106(4) Quarterly Journal of Economics 1089-1127 (1991).

Biases, transparency and accountability

The mechanisms of regulatory capture do not require a conspiracy. The production of better norms for the public good is easily distorted by powerful interest groups, such as an industry sector, through the provision of biased information. Another way to influence regulation is by options of jobs at organisations that have been regulated (revolving doors).⁵⁶ But outright corruption happens as well. Regulatory capture is not a given, however. The probability that rule makers fail to serve the public interest can be diminished by more *transparent* procedures and increased *accountability*.

Sustainability of rulemaking: Costs and benefits for participants

Another issue in the economics of regulation is the incentives on the lawmakers and their analysis of costs and benefits. Rulemaking can only work and be effective if it is funded in a sustainable way. Basically, the literature argues:

- Designing appropriate rules is quite costly (information costs, costs of deliberation, drafting). Private, international, informal rulemaking may lower these costs.
- It is very difficult to recoup these costs by charging them to users of the rules.
- So there is a lack of incentives on rule makers to produce appropriate rules.
- Rules, and private rules in particular, are thus almost always a by-product of other activities.⁵⁷
- Rule makers can shift costs of rulemaking to the phase of application of the rules by using standards (vague norms that need to be made into concrete rules at the stage of applying them) or by just establishing procedures instead of substantive rules. *Dispute resolution* and costs of *compliance* may be affected by this.

On the other hand, stakeholders will invest in better rules when they can lower their own decision costs and/or error costs associated to rules. A company may be able to save substantial administrative costs by having more simple procedures in place, or may gain from removing rules that impede profitable and socially desirable activities. But a company will not always invest in better rules. Why should it invest in better rules if all competitors also benefit from their work (free rider problem)? Companies are more likely to invest in better rules if they stand to gain more from better rules than their competitors because they are better placed to do the activities enabled by the new rules. So the costs and benefits equation is another reason why the rulemaking process can be distorted.

Effectiveness

When applying economic analysis to the *opportunities, challenges and effectiveness* of new trends in regulation, the following framework thus emerges: Do the new forms of regulation: a) cause lower (or higher) administrative costs than the alternatives of formal national or international rulemaking; b) make the regulators better (or less) informed about the issues to be regulated; c) increase (or decrease) the risk of regulatory capture; d) improve (or worsen) the sustainability of rulemaking, by making it more likely that the costs of rulemaking can be recouped from stakeholders?

2.3 Assessing impacts and outcomes

Regulatory impact assessment

In the end, the question for any rulemaking process is whether it works. Economic analysis provides valuable insights into the ways to improve the effectiveness of the rulemaking process. But, ultimately, the question is whether the rules lead to better results. Measuring whether a particular rule or rule system is actually doing what it was supposed to do is difficult under any circumstances.

⁵⁶ See for one NGO monitoring this: <http://www.opensecrets.org/revolving/>.

⁵⁷ B. Kobayashi & L. Ribstein, *Law as a By Product: Theories of Private Law Production*, (2011). Retrieved on 23 August 2012 from http://www.law.yale.edu/documents/pdf/cbl/SSRN-id1884985_%281%29.pdf. See also A. van Aaken, *Law as a By Product: A View from Constitutional Law*. Comment on Larry Ribstein and Bruce Kobayashi, in H. Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution* (2012) (forthcoming) (Criticizing Kobayashi and Ribstein).

Regulatory impact assessment, including cost benefit analysis, has become a discipline and a profession in its own right.⁵⁸ But, as a recent empirical study of this practice puts it, the field struggles with quite a few “illusions”. Regulation does not proceed linearly from a problem to a rational solution. Neutral and objective analysis is difficult, due to a lack of reliable estimates of various impacts, and the problem how different impacts should be weighted. There is also the illusion of a neutral, objective decision-maker, whereas regulation is more like a negotiation process between many different stakeholders with different perspectives.⁵⁹

Impacts from many rules across the world

In a world with rules coming from many sides, with more private interests around the table, with impacts in many different ways in different places across the globe, assessing impacts is even more challenging.⁶⁰ We have not found a generally accepted evaluation approach for multilevel rulemaking. It is very hard to distinguish the contributions of each extra rulemaking and compliance activity undertaken by all these players in their many different capacities. And it is hard to gauge the impacts of the total body of rules as well. Still, progress has been made. The European Commission now uses impact assessment mechanisms for EU legislation.⁶¹ The OECD has developed guidelines for policy makers.⁶² The IMF has the Mutual Assessment Process, which assesses how national regulatory regimes interact to achieve common goals.⁶³

Outcomes and experiences by citizens

The last decades have also shown the emergence of empirical tools to measure outcomes as experienced by citizens. There are now methods to assess justice,⁶⁴ happiness,⁶⁵ peace⁶⁶ and even accountability.⁶⁷

Legitimacy and buy in

We also know much more about the reasons why people buy into and comply with regulation. If the rules serve a clear goal, with which people can easily identify, and procedures are considered to be fair, rules are much more likely to be accepted and followed. So clear goals and fair rulemaking procedures are indications of effectiveness.

Pragmatic methods for assessing effectiveness

There is a large gap, however, between what is possible to measure and what is actually measured. So in this report, we will mainly have to rely on more pragmatic methods to assess whether private, informal, international regimes are contributing to the effectiveness of the regulatory environment. Some rules have a clear goal, such as the eradication of child labour, which can be measured quite effectively. Experts assessing mechanisms have opinions about them, informed by a perspective of economic analysis, legitimacy or regulatory impact assessments. And a final indication of effectiveness is whether rules are actually known and used. If they do not become integrated in the activities of companies and the systems of cooperation between people, they are likely to be less effective.

⁵⁸ See C.M. Radaelli & F. De Francesco, Regulatory Impact Assessment, in M. Cave, R. Baldwin & M. Lodge (Eds.), *The Oxford Handbook Of Regulation*, Chapter 15 (1999).

⁵⁹ J. Hertin, K. Jacob, U. Pesch & C. Pacchi, *The Production and Use of Knowledge in Regulatory Impact Assessment – An Empirical Analysis*, 11 *Forest Policy and Economics* 413, at 427 (2009).

⁶⁰ A. Meuwese & C.M. Radaelli, *Hard Questions, and Equally Hard Solutions? Proceduralization Through Impact Assessment in the European Union*, 33 (1) *West European Politics* 136, at 141 (2010).

⁶¹ Retrieved on 23 August 2012 from http://ec.europa.eu/governance/better_regulation/impact_en.htm.

⁶² Retrieved on 23 August 2012 from <http://www.oecd.org/dataoecd/44/15/40984990.pdf>.

⁶³ Retrieved on 23 August 2012 from <http://www.imf.org/external/np/exr/facts/g20map.htm>.

⁶⁴ TISCO Measuring Access to Justice tool.

⁶⁵ Retrieved on 23 August 2012 from <http://www.happyplanetindex.org/>; <http://www.grossnationalhappiness.com/>; <http://www.oecdbetterlifeindex.org/>.

⁶⁶ Retrieved on 23 August 2012 from <http://www.visionofhumanity.org/gpi-data/>.

⁶⁷ Retrieved on 23 August 2012 from <http://www.oneworldtrust.org/component/content/article/93-showcase/355-pathways-to-accountability-ii>.

3. Opportunities and Coping with Challenges



3.1 More rules, more protection, generally

More rulemaking capacity

The options of private and informal rulemaking can be beneficial because they add rulemaking capacity. If two communities of stakeholders care about the safety of the fast food sold on the street, they are likely to create more protection than one. Every additional private rule system commits a new group of people, adds to the incentives for compliance, and learns from the mistakes of other networks. Some networks will not add much, some will utterly fail, and sometimes this will cause a backlash in overall protection. But, generally speaking, the open, multilevel landscape of rules makes it more likely that people can protect their interests.

Take human rights. They are now safeguarded by national constitutions, regional and international treaties, international and regional courts, but also in the ISO 26000 norm for corporate social responsibility,⁶⁸ the UN Global Compact and millions of private contracts that make human rights an issue between buyers and sellers, or by employers and employees. These rules are monitored by countless organisations, both public (UN, European Human Rights Agency for Fundamental Human Rights, and national human rights agencies, for instance) as well as private (Amnesty International, Human Rights Watch and thousands of local human rights NGOs across the world). The sum of all these activities is certainly thickening protection.

Private international rulemaking increases rulemaking capacity. There is no need to wait until the problem becomes a priority for national legislators and national parliaments. Those with a stake in rules and willing to invest resources can come together and set them. Rule makers can benefit from economies of scale, because standards can be set for many countries and relying on international expertise.

More choice for citizens to take action and issue complaints

If you live somewhere in Europe and happen to see a commercial on a French television channel that is misleading you may wish to file a complaint. In such a case several options exist, such as complaining directly at the regulator in Paris, in a French court or with the company behind the commercial itself. However, under the auspices of the European Advertising Standards Alliance (EASA), a private regulatory agency, a new, and much faster avenue for complaints has been created: you can complain about the advertisement with the advertising regulator in your own country. That regulator will see to it that the complaint is dealt with by the French authority overseeing that advertisements are honest, truthful, socially responsible and respecting the competition rules. The EASA avenue exists next to the other options. Thus, if one of these mechanisms does not work, you can switch to another one. More options for redress may be confusing, but after you have sorted out which one works best the competition between complaint mechanisms is generally beneficial. Citizens can mobilize different forums where norms can be created. They can influence companies and governments to address issues that cannot be addressed (sufficiently) at national governmental level.

More choice for companies to join or create appropriate regulatory regimes

Companies, too, have more choice. Often, they can opt for different regulatory regimes or a combination of regimes that fits the efficient conduct of their operations. Because rule makers have an interest in the use of their rules, new regimes or adaptations to existing regimes may lead to better rules, which benefits the users of these rules.⁶⁹

⁶⁸ Retrieved on 23 August 2012 from <http://www.iso.org/iso/home/standards/management-standards/iso26000.htm/>.

⁶⁹ K. Heine & W. Kerber, European Corporate Laws, Regulatory Competition and Path Dependence, 13 European Journal of Law and Economics 47, at 51-52 (2002).

Private rulemaking for the common good: Legitimacy through market mechanisms

In theory, private rules will only be created if all stakeholders participating in the new rules can benefit. Otherwise there would be no agreement. Basically, private rules are contracts committing a great number of people, and are as beneficial to the economy and human wellbeing as any agreement between two parties. So private rulemaking generally creates win-win situations, committing more people to a policy that is beneficial, such as striving for ads and commercials that can be trusted and do not offend. Private rules tend to serve the common good in this particular way. They can gain legitimacy by gradually penetrating the market, and lose legitimacy when people turn away from them because they no longer regard them as the best possible rules.

Cartels may occur but can be prevented

But not always. Powerful companies can use private agreements to divide the market between them. Professional organisations of lawyers, architects or doctors may tell their customers that rules are needed to protect them from low quality, but use the rules to make it more difficult for new entrants into their markets. Many tricks can be played, such as a “patent ambush”. Here a company promotes a standard first and then comes up with a patent so that everybody in the market is cheated into having to pay royalties. Private standard-setting agreements should be critically assessed.⁷⁰ Anti-competition authorities keep an eye on standard-setting and have extensive powers to sanction cartel-like behaviour. As a matter of fact, private rulemaking is perhaps more closely watched than public rulemaking processes, which are not combed systematically for cartel-like behaviour.

Races to the bottom and remedying them

Private rulemaking may, occasionally, lead to a race to the bottom, where certain interests receive less protection because rule makers loosen their standards. Research in the field of tax competition,⁷¹ environmental protection⁷² and labour rights standards⁷³ has shown that both races to the top and to the bottom are occurring, but that races to the bottom are often followed by coordination between standard-setters. Generally, if private rules no longer represent win-win solutions where all interests of those participating in the norm-setting process are protected, the rules will lose their attraction and new rules are more likely to emerge.

More room for (national) variation and flexibility

Transnational regulatory regimes can be flexible. Particular problems in one part of the world, such as high unemployment, can be addressed by loosening a particular rule protecting a specific right of employees, if that is a major cost for business in the particular circumstances of that country. National advertising regimes protect different levels of privacy, and such differences can be allowed to persist, even if EASA sets a standard that can be followed by Eastern European countries that did not yet have a code. In contrast to (inter)national law, transnational private rules can adapt more easily to changing circumstances and needs. Complex treaty amendment processes or a change of a formal law in parliaments are not necessary.

Increase of enforcement capacities

Transnational governance networks can easily set up enforcement mechanisms. This has led to a tremendous increase of monitoring and, with that, to better enforcement. The Access to Medicine index monitors how big pharmaceutical companies contribute to making medicine available to everyone.⁷⁴ The right to health is thus enhanced.

⁷⁰ OECD Policy Roundtables Standard Setting 2010, DAF/COMP (2010) 33, 8 March 2011.

⁷¹ P. Genschel & P. Schwarz, Tax Competition: A Literature Review, 9 Socio-Economic Review 339, (2011).

⁷² K. Holzinger & T. Sommerer, Race to the Bottom or Race to Brussels? Environmental Competition in Europe, 49 Journal of Common Market Studies 315, (2011).

⁷³ B. Greenhill, L. Mosley & A. Prakash, Trade-Based Diffusion of Labor Rights: A Panel Study, 1986-2002, 103 (4) American Political Science Review 669, (2009).

⁷⁴ Retrieved on 23 August 2012 from <http://www.accessmedicineindex.org/content/index-2010-0>.

Enforcement of anti-corruption rules has been helped by the Transparency International Global Corruption Perceptions Index and databases of so-called politically exposed persons, set up by organisations like World Compliance⁷⁵ and Lexis Nexis.⁷⁶ It is very doubtful whether a group of states could have come together to build the ranking of the Global Corruption Perception Index and the World Justice Project Rule of Law Index, the standards developed by the Extraction Industries Transparency Initiative⁷⁷, or the Global Reporting Initiative on Sustainable Development.⁷⁸

3.2 Participation hard to achieve

Participation needed



For good reasons, the rule of law perspective suggests that a rulemaking process must be accessible and fair to all stakeholders. Participation is valued in its own right, but it also increases the legitimacy of the process, and through this the compliance with outcomes. Moreover, cartel-like behaviour is less likely, if consumers and new entrants with innovative models for certain activities can participate. In theory, states guarantee participation in rulemaking through periodic general elections that give mandates to politicians. Transnational governance networks do not have such processes in place, however.⁷⁹

End-users not represented

Very often, standards are set, guidelines are drafted, rules agreed on without involving the end-users. The IATA develops rules and standards on passenger handling at airports, but passenger organisations are not IATA members. The European Payment Council (EPC), a private organisation that aims to make European low-value electronic payment systems via credit card, debit card, bank transfer, as easy, secure and efficient as possible, was long non-inclusive and represented a single stakeholder structure. This changed in 2008 when all groups of stakeholders were given the right to submit a change for the Single Euro Payment Area (SEPA) schemes and a public consultation process was established for all changes. However, end-users and suppliers were not given any control over decision-making and were not given membership or observer-status in the EPC-plenary, the main decision-making body of the EPC.

Lower income countries not represented

Lower income countries have not taken a leading role in any of the important transnational networks. Often, they are even excluded altogether. This is very visible in the area of finance. The FSB is a “closed club”, of principally higher income states.⁸⁰ Its decisions, however, affect lower income countries; opting out is not possible for them, for nations cannot opt out of the global economy.⁸¹

⁷⁵ Retrieved on 23 August 2012 from <http://www.worldcompliance.com/en/compliance-database/global-pep-list.aspx>.

⁷⁶ Retrieved on 23 August 2012 from <http://www.lexisnexis.org.uk/risk/sanctions-watchlists-and-politically-exposed-persons-peps/>.

⁷⁷ Retrieved on 23 August 2012 from <http://eiti.org/document/rules>.

⁷⁸ Retrieved on 23 August 2012 from <https://www.globalreporting.org/Pages/default.aspx>.

⁷⁹ For TPR, see, e.g., J.C. Graz & A. Nölke, *Transnational Private Governance and Its Limits*, at 5, (2008). For IN-LAWIN-LAWIN-LAWIN-LAW, see, J. Pauwelyn, R. Wessel & J. Wouters, *Mapping the Action and Testing Concepts of Accountability and Effectiveness*, in J. Pauwelyn, R. Wessel & J. Wouters, (Eds.), *Informal International Lawmaking* (2012) (forthcoming).

⁸⁰ The following countries are listed as members of the FSB: Argentina, Australia, Brazil, Canada, China, France, Germany, Hong Kong, India, Indonesia, Italy, Japan, Mexico, The Netherlands, Russia, Saudi Arabia, Singapore, South Africa, South Korea, Spain, Switzerland, Turkey, United Kingdom, and the United States. These states participate through their central banks, financial ministries and departments, and securities regulators. The following organisations are listed as members of the FSB: Bank for International Settlements, European Central Bank, European Commission, International Monetary Fund, Organisation for Economic Co-operation and Development, The World Bank. Retrieved on 23 August 2012 from <http://www.financialstabilityboard.org/members/links.htm>. It will be noted that not a single Low Income Country is a member of the FSB.

⁸¹ M. Prowse, *Why the governance rules of the Financial Stability Board will not satisfy any true democrat*, retrieved on 23 August 2012 from <http://www.new-rules.org/new-rules-blog/222-blog-12>.

But it can also play out in more mundane issues. The ICH sets rules on running clinical trials in which patients can be treated with placebos instead of existing therapy. Often conducted in developing countries, these have led to people dying, who could have been saved by using existing proven therapy.⁸² Possibly, this would not have happened if the Global South had been better represented. Still, some progress is made. The governance of GlobalG.A.P. has gradually become more inclusive.⁸³ In the Codex Alimentarius context, efforts have been made to improve the (more egalitarian) participation of all countries, for example via the establishment of the Codex Trust Fund. Through the Fund financial support will be made available to enable developing countries and those with economies in transition to both prepare for and participate in, amongst others, Codex Alimentarius Commission meetings.

Participation through mandates by elected bodies for negotiators does not work

What about parliaments telling negotiators what to do in the rulemaking process? This has proven not to be a very effective way to ensure participation. The chain from citizens to elected representatives to a decision in parliament to the executive to an individual negotiator to a regulatory network and then back again for more instructions if the negotiations develop is just too long and has too many weak spots.⁸⁴ What is the value of the mandate given to the president of a central bank of a medium-sized country when he attends a meeting of the FSB? To what extent can he be held to account for the final outcome? The rulemaking process is at its best when it is an open, interactive search for the best solutions for the interests of all stakeholders.

Opening up membership and observer status

Opening up a standard-setting process and consulting potentially affected stakeholders, preferably from the start, enhances participation. As the textbox shows, there is a clear trend towards extending membership and allowing organisations to observe the rulemaking processes. But these trends are not uniform, so it is necessary to look at the barriers to increasing participation.

⁸² J. Pauwelyn, R. Wessel & J. Wouters, Mapping the Action and Testing Concepts of Accountability and Effectiveness, in J. Pauwelyn, R. Wessel & J. Wouters, (Eds.), *Informal International Lawmaking* (2012) (forthcoming).

⁸³ A. Kalfagianni and D. Fuchs, *The GlobalGAP* (2010), Retrieved from http://www.uni-muenster.de/imperia/md/content/fuchs/publikationen/publikationenfuchs/arbeitspapiere/fuchs_kalfagianni_2010_globalgap_working_paper.pdf.

⁸⁴ T. Corthaut, B. Demeyere, N. Hachez, & J. Wouters, Operationalising Accountability in Respect of Informal International Lawmaking Mechanisms, in J. Pauwelyn, R. Wessel & J. Wouters (Eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, Chapter 14, (2012) (forthcoming).

International public and private networks open up

In 1919 the International Labour Organization (ILO) was an early adapter, with a tri-partite membership in the governing board consisting of states (28), labour unions (14) and employer organisations (14). The UN has led the way here: between the 1970s and now the number of NGOs granted consultative status and, with that, a right to express views in decision-making, has grown to around 4000. Decision-making in the area of human rights and the environment would not be possible without these NGOs, even though NGOs do not have any decision-making powers anywhere. Non-governmental or mixed networks are following this trend. The International Code of Conduct for Private Security Service Providers, aimed at improving human rights performance,⁸⁵ was established as a result of extensive consultations between industry associations, corporations, individual business leaders, the governments of Switzerland, the United Kingdom and the United States, international organisations, NGOs and other stakeholders and experts. The International Telecommunication Union (ITU) boasts a membership of 193 countries and over 700 private-sector entities and academic institutions.⁸⁶ In the case of the Codex Alimentarius Commission,⁸⁷ the involvement of non-state actors in the multiple stages of the standard-setting procedure is reflected in formalised and publicly accessible participation rules: non-governmental organisations may apply to attend sessions of the Commission and of its subsidiary bodies as observers. The ISO has clear and very explicit rules to govern participation (from both public and private actors, as well as external stakeholders) in decision-making processes. The FSB announced arrangements to expand and formalise outreach beyond its membership. To this end, six regional consultative groups were established to bring together financial authorities from FSB member and non-member countries to exchange views on vulnerabilities affecting financial systems and on initiatives to promote financial stability. Participation is, however, more limited at the technical, standard-developing level, where it is organised indirectly through national delegations. ISO has been more active in encouraging civil society participation in broader, strategic procedures beyond the purely technical level of norm-creation.

Reasons for participants to limit access

Effective decision-making may be a reason for networks not to open up. It also creates incentives to start new, smaller groups that can take the lead. Exclusivity of access to the table can also be one of the assets of the network, needed to keep it going. ISO, the international standard-setting body, encourages experts to participate on its website, because it “can help *give you early access* to information that could shape the market in the future, *give your company a voice* in the development of standards and help to keep *market access open*.” The G20 retained its exclusivity by opening up in a very restricted way. The members agreed that each year five non-G-20 states from different geographical regions could take part. The Mexican presidency invited Benin, Cambodia, Chile, Colombia, and Spain. The global financial crisis has also led a number of important institutions to expand their membership, particularly to developing and emerging countries, with a similar reluctance. Early in 2009, the Technical Committee of the International Organization of Securities Commissions (IOSCO) expanded its membership to include Brazil, India, and China. In March 2009, approaching the deadline set by the G-20, the BCBS expanded its membership to include developing countries for the first time, adding Brazil, China, India, South Korea, and Mexico in addition to Australia and Russia. In June 2009, the BCBS expanded further to include all G20 countries that were not yet members (Argentina, Indonesia, Saudi Arabia, South Africa and Turkey), along with Hong Kong and Singapore, all of which constitute countries that supervise large banks. Countries with a smaller banking sector are still not adequately represented. The same applies for countries that do not have national banks (such as some Eastern European states).

⁸⁵ Retrieved on 23 August 2012 from <http://www.icoc-psp.org/>.

⁸⁶ Retrieved on 23 August 2012 from <http://www.itu.int/en/about/Pages/membership.aspx>.

⁸⁷ Retrieved on 23 August 2012 from <http://www.codexalimentarius.org/>.

Barriers to participation for citizens and consumers

The other side of the participation equation is willingness to participate. Taking part in conferences requires time, money for travelling and expertise, also for developing countries. Consumers and their organisations often lack the resources for meaningful participation. Although the number of lives saved and awkward injuries prevented may be substantial, each individual consumer has little to gain from better standards for ski bindings or rubber footwear.⁸⁸ As we have seen in Section 2.2, free-riding is likely to occur. Consumers, employees and citizens in general have difficulties organising themselves effectively if the issue affects all of them. Unless there is a small group of heavy users that can take the lead, it may very well be that no consumer organisation can be found to represent the user interests. Many rulemaking networks opened up their membership, but did not attract any participation from consumers, citizens and end-users at all.

More consultation and notice and comment procedures

This is also affecting other procedures for participation: consultation regarding possible regulation through websites and notice and comment procedures. These procedures are increasingly used, even by the top regulators, such as the BCBS. Any interested stakeholder in the Basel 2 and 3 accords is entitled to submit comments. Apart from the fact that these consultation procedures did not attract any significant comments by NGOs or consumer organisations because of the highly complex and technical nature of the matters being regulated,⁸⁹ it is by no means sure, however, that notice and comment proceedings are used by the people with the best expertise or represent the views of customers in the best possible way. For them, it may not be attractive enough to participate. Participation is also costly for the network, because comments have to be read, understood and aggregated into summaries. In order to let participation be meaningful, the comments also have to be related to the outcomes. Ideally, each commentator would be able to trace whether his point contributed to the solution.

Innovation needed to close the participation gap

Discussions on participation in the international rulemaking environment quickly focus on democratic deficits and issues of representation. As long as the exercise of rulemaking power is viewed through a principal-agency model and the democratic parliamentary paradigm, participation is not likely to improve. The chain of delegation and mandates from a governance network to a parliament is too long and thin. Other, more promising forms of participation are emerging. We mention some options and developments:

- Creation of special **trust funds** to enhance participation of citizens and organisations from low income countries. This can be a partial solution to incentive problems.
- Clear policies from government authorities or agencies to focus primarily on safeguarding **the interests of groups, which are difficult to organise**. Consumer authorities, ombudsmen and competition authorities are examples of this.
- **Technologies for group decision-making** in companies, such as the analytical hierarchy process and the Delphi method.⁹⁰
- Developing **innovative (online) participation procedures and software**, specifically designed to lower the costs and increase the benefits of participation, both for networks and for the participants.⁹¹ Participedia.net and expernet.wikispaces.com are websites where the most recent developments are posted.
- **Streamlining consultation and notice and comment procedures** in such a way that they start from the problem as perceived by the citizen/consumer, and not from the solution proposed by the rule makers.

⁸⁸ ISO 11087: 2004, Alpine ski-bindings - Retention Devices - Requirements and Test Methods; ISO 2023: 1994, Rubber footwear – Lined Industrial vulcanized-rubber boots – Specification.

⁸⁹ M. S. Barr and G. P. Miller, Global Administrative Law: The View from Basel, 17(1) EJIL 15–46, at 25 (2006).

⁹⁰ Retrieved on 23 August 2012 from http://en.wikipedia.org/wiki/Group_decision_making.

⁹¹ C. Farina, M. Newhart, C. Cardie & D. Cosley, Rulemaking 2.0, 65 (2) University of Miami Law Review 1001, at 1014, (2011); C. Coglianese, Federal Agency Use of Electronic Media in the Rulemaking Process, Report to the Administrative Conference of the United States, (2011); M. Leighninger, Deliberative Democracy Consortium, Using Online Tools to Engage and be Engaged by the Public, IBM Center for the Business of Government.

3.3 Transparency of processes: Not easy to practice what you preach

Transparency broadly accepted as a value



Transparency is now generally accepted as a core element of good governance.⁹² Transparency laws proliferate around the world,⁹³ civil society works hard on it, international open government networks are being set up,⁹⁴ and international organisations mainstream transparency as indispensable to avoid regulatory capture.⁹⁵ If a standard-setting procedure is not transparent, accountability becomes a problem.⁹⁶ Transparency enhances legitimacy of the process and thus the effectiveness of the regulatory regime. Corruption becomes less likely.

Closed clubs, inaccessible information?

Research on transnational governance networks tends to be critical about transparency.⁹⁷ They are said to have a closed club-like nature⁹⁸ and to shift decision-making away from accessible, accountable national government to international bodies that are inaccessible to citizens and other stakeholders.⁹⁹ Accountability towards peers is replacing public accountability.¹⁰⁰ What does not help its image in this respect is that it is very hard to monitor what happens at some champions of informal rulemaking and globalisation: the FSB and the G20.

⁹² See, e.g., the Open Government Partnership, retrieved on 23 August 2012 from <http://www.opengovpartnership.org/about>; Transparency International, retrieved on 23 August 2012 from <http://www.transparency.org/>; the Transatlantic Roundtable on Global Challenges in Transparency and Open Government, held on 16 May 2012, retrieved on 23 August 2012 from <http://futurechallenges.org/news/transatlantic-roundtable-on-global-challenges-in-transparency-and-open-government/>.

⁹³ Until 1992 there were only 12 transparency laws. The number skyrocketed to around 90 by 2011. (cf. Toby McIntosh, FOI Laws: Counts Vary Depending on Definitions, retrieved on 23 August 2012 from <http://www.freedominfo.org/2011/>).

⁹⁴ See, e.g., the Open Government Partnership, retrieved on 23 August 2012 from <http://www.opengovpartnership.org/about>; Transparency International, retrieved on 23 August 2012 from <http://www.transparency.org/>; the Transatlantic Roundtable on Global Challenges in Transparency and Open Government, held on 16 May 2012, retrieved on 23 August 2012 from <http://futurechallenges.org/news/transatlantic-roundtable-on-global-challenges-in-transparency-and-open-government/>.

⁹⁵ See R. Cruz Prieto, On The Disadvantages of Transparency for Government: Reflections on Some Arguments Against Transparency as a Democratic Reform Strategy, Paper prepared for the Transatlantic Conference on Transparency Research, Utrecht, June 7 – 9, 2012, at 2, retrieved on 23 August 2012 from <http://www.transparencyconference.nl/wp-content/uploads/2012/05/Cruz-Prieto.pdf>.

⁹⁶ J. Pauwelyn, R. Wessel & J. Wouters, Mapping the Action and Testing Concepts of Accountability and Effectiveness, in J. Pauwelyn, R. Wessel & J. Wouters, (Eds.), *Informal International Lawmaking* (2012) (forthcoming).

⁹⁷ R. O Keohane, *Global Governance and Democratic Accountability*, (2002), retrieved on 23 August 2012 from <http://www2.lse.ac.uk/publicEvents/pdf/20020701t1531t001.pdf>; see generally, A. Berman, The Role of Domestic Administrative Law in the Accountability of IN-LAW: The Case of the ICH, in J. Pauwelyn, R. Wessel & J. Wouters (Eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, Chapter 22, (2012) (forthcoming).

⁹⁸ D. Zaring, Informal Procedure, Hard and Soft, in *International Administration*, 5 *Chicago Journal of International Law* 547, at 595, (2005).

⁹⁹ L.M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and the International Harmonization of Standards*, 5 *University of Kansas Law Review* 823, at 833, (2001-2002).

¹⁰⁰ Y. Papadopoulos, Problems of Democratic Accountability in Network and Multilevel Governance, 13(4) *European Law Journal* 469, at 480 (2007).

Transparency of the making of principles for responsible investment

The organisation working on the UN Principles of Responsible Investment (PRI), a network of international public and private investors coming together to put the six Principles for Responsible Investment into practice, has been regularly criticised for its lack of transparency: "In the initial drafting phase [of the six Principles], which began in 2005, some external stakeholders were invited for consultations. Around seventy experts were invited to participate and though we know that they came from a range of backgrounds ('the investment industry, intergovernmental and governmental organisations, civil society and academia'), not much else is known about who these experts were, what countries they came from, how many experts came from each group, or how their feedback was, if at all, incorporated into the final Principles."¹⁰¹

The surveys that PRI uses to evaluate its members' compliance with the principles are not publicly accessible. Access to many PRI resources is members-only, with a small number of publications made public, such as annual reports highlighting selected activities of signatories and networks. Limiting access is partly a response to the obvious free-rider problem: why would organisations join PRI and commit to reporting and paying the membership fees, if one of the major benefits, the access to information, best practices, etc. is open to everyone?

The process of drafting SEPA rules has been criticised as non-transparent, and the same is true for the rulemaking process of the International Payments Framework (IPF). Here, the standards are set behind closed doors and not even the final products are available to the public. This also applies to the IPF charter and the Rulebook. Although there is some degree of organisational transparency, a high level of secrecy and lack of transparency characterises the private military and security companies' standard-setting process (the so-called "Voluntary Principles").¹⁰²

Transparency on membership organisations, not on people participating

So what exactly is this criticism about? Most rulemaking networks are fairly transparent with respect to who the members of the network are.¹⁰³ The Global Compact website allows you to find its members and participants per country.¹⁰⁴ Generally, that openness extends to organisations, but not to people. You will not find on the OECD website who participates in the work of the International Network on Conflict and Fragility (INCAF). The website of the G20 does tell you that the sherpas – the representatives of the heads of State – had a meeting, it tells you in broad terms what was discussed, but it does not tell you who the sherpas are. The FSB is more open, revealing on its website who is a member of which committee.¹⁰⁵ If expertise is important and determines legitimacy, knowing who the experts are can be very relevant. But networks rarely if ever indicate from which group the members are chosen and which procedure was followed (except for general statements like: "Members come from NGOs, academia, and business"). The members of the Working Party 29, a network of data protection regulators in the EU, are known by name and function, though. An extensive CV can be found on the website.¹⁰⁶

¹⁰¹ M. Smith, The United Nations Principles For Responsible Investment From An In-Law Perspective, in J. Pauwelyn, R. Wessel, J. Wouters (Eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, at 33, (2012) (forthcoming).

¹⁰² W. van Genugten, N. Jagers & E. Moyakine, *Case Study Report on Private Military and Security Companies*, This case study is part of the HiIL research project Private Transnational Regulatory Regimes – Constitutional Foundations and Governance Design, led by F. Cafaggi, C. Scott and L. Senden. The case study is on file at the EUI, Florence.

¹⁰³ Retrieved on 23 August 2012 from <http://www.kimberleyprocess.com/web/kimberley-process/monitoring>;
<http://www.financialstabilityboard.org/about/pac.htm>.

¹⁰⁴ Retrieved on 23 August 2012 from <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>.

¹⁰⁵ Retrieved on 23 August 2012 from <http://www.financialstabilityboard.org/about/pac.htm>.

¹⁰⁶ Retrieved on 23 August 2012 from http://ec.europa.eu/justice/policies/privacy/workinggroup/members_en.htm

Transparency on agenda and on results, not about process and compliance

Generally, networks are open about the meetings they had and what they produced. What you do not see is the issues that are at the centre of the debate, the aims of the rules to be designed, the interests of stakeholders that are put on the table, and certainly not the controversies, the differences of view and the failures to reach agreement. Most networks are more transparent on end-results, the outcome of a meeting or the production of a report. They are less open about the road that led to that outcome. This may be different in the setting up of a standard or an index. In such cases, being transparent about the steps that were taken is part of the quality of the product and thus generally shared.¹⁰⁷ Data on compliance is not shared widely either, except in the case of indexes and rankings specifically designed to increase compliance, such as the Global Corruption Perception Index. Action following non-compliance also tends to take place behind closed doors.

Transparency in state legislation and IGOs

But what exactly is the benchmark here? Proposals for national laws tend to be published, and can be openly debated, but in the preparatory phase the dialogue tends to take place behind closed doors. When the outcome is presented publicly, it is often not with full openness about the underlying policy goals, the alternatives that have been considered and the points of view of different stakeholders. Government actors in networks are certainly not among the best performers. Cabinets and ministries tend to take decisions behind closed doors and have a battery of security measures, secrecy rules for documents and executive privileges to prevent the media from taking note of what really happens. Courts, who can be important rule setters, let the parties debate their points of view in public, but tend to deliberate behind closed doors, although practices differ from country to country. IGOs like the UN are known for their lack of transparency, although they too are being forced to open up a bit.

Reasons for processes not being transparent

If the value of transparency is widely shared but not practiced, it is a good idea to look into the incentives for keeping the doors closed. Those who have access share an interest to make access to the table an exclusive privilege. Security, privacy concerns and trade secrets may be an issue,¹⁰⁸ but for most norms they are not very relevant. Transparency of the process can be costly, if it requires extensive reporting of every stage and everything that has been said during meetings. But that is not the main reason why meetings are not recorded and put on YouTube. Negotiations might become hard to manage if positions were exchanged publicly and dissent between participants would be amplified by the media. Career concerns may become more prominent and cause people to be cautious in exploring ways to achieve results.¹⁰⁹ Group members may coalesce around the most popular policy position instead of solving the problem.¹¹⁰ Public meetings may encourage political posturing instead of compromise, reducing the likelihood of compromises or negotiated agreements.¹¹¹ Commercial interests may cause company people to be less open than they would be behind closed doors. Finally, closed doors are attractive from a point of view of raising resources to cover the costs of the process. Participants are more likely to pay for access if there is exclusive knowledge and influence to be obtained behind the doors.

¹⁰⁷ Retrieved on 23 August 2012 from <http://www.oneworldtrust.org/component/content/article/93-showcase/355-pathways-to-accountability-ii>.

¹⁰⁸ E.E. Otenyo & N.S. Lind, *Faces and Phases of Transparency Reform in Local Government*, 27 (5) *International Journal of Public Administration* 287, at 291, 298 (2004).

¹⁰⁹ E.E. Meade & D. Stasavage, *The Dangers of Increased Transparency in Monetary Policymaking*, *Economic Journal* 695-717 (2008). Available at <http://www.voxeu.org/article/cost-central-bank-transparency-closed-doors-open-minds>.

¹¹⁰ See J.D. Frank, *Nuclear Arms and Prenuclear Leaders: Sociopsychological Aspects of the Nuclear Arms Race*, 4(2) *Political Psychology* 393, (1983), citing Janis & Mann, 1977.

¹¹¹ See D. Stasavage, *Open-Door or Closed-Door? Transparency in Domestic and International Bargaining*, 58 (4) *International Organization* 667, at 671 (2004).

Under pressure, networks open up in a way that works

Under international pressure, the Basel Committee slowly opened up.¹¹² Background papers to inform the public about its thinking on key issues were issued and workshops were held with banks and other firms.¹¹³ The Committee released a second consultative package as a proposal for a “New Basel Capital Accord” in January 2001. It requested comments and posted 259 replies on its webpage, mostly from the large industry players, but also from governments, academics, other international organisations, small banks, credit unions, and even one community group.¹¹⁴ In the following months, the Committee regularly sent out updates on its review process. In June 2004, at the release of the new accord, the Committee indicated that “the Basel Committee’s work benefited from the transparency and scale of the public consultations that took place both within the G-10 countries and around the world, helping to make the new framework a global product” and noted that it “would continue to work in the spirit of openness and consultation in the future”.¹¹⁵ The US Food and Drug Administration (FDA), issued regulations, which provide minimum procedural requirements with which an outside standard-setting activity must conform before FDA employees can participate. One of the requirements is that the “development process for the standard is transparent (i.e. open to public scrutiny)”.¹¹⁶ The ICH had to incorporate these standards if it wanted the US to participate.

Innovative approaches to transparency are possible

In order to gain an idea of how transparent rulemaking can be, it is interesting to look at the rulemaking processes on Wikipedia, where every conceivable step by any person in the social process towards a rule has been given a name and can be followed online by every stakeholder. Many experiments with fully transparent rulemaking processes are now taking place. Mariko Peters, a former Dutch MP, tabled a legislative initiative (a law on open government), which she prepared on the basis of a fully open consultation process supported by a website.¹¹⁷ This does not prove that completely transparent rulemaking is possible for every regulatory network, of course. Wikipedia guidelines are not about money or saving lives.

¹¹² Secretariat of the Basel Committee, The new Basel Capital Accord: an Explanatory Note, retrieved on 23 August 2012 from <http://www.bis.org/publ/bcbsca01.pdf>.

¹¹³ M. S. Barr & G. P. Miller, *Global Administrative Law: The View from Basel*, 17 (1) EJIL 15, at 24 (2006).

¹¹⁴ *Id.* at 25.

¹¹⁵ BIS, Press Release, G10 Central Bank Governors and Heads of Supervision Endorse the Publication of the *Revised Capital Framework*, 26 June 2004, retrieved on 23 August 2012 from www.bis.org/press/p040626.htm.

¹¹⁶ FDA International Harmonization: Policy on Standards (Notice), 11 October 1995, s IV(A)(3).

¹¹⁷ Retrieved on 23 August 2012 from <http://nieuwewob.nl/>.

Wikipedia governance

Wikipedia is now one of the main places where reputations are built and can be destroyed on the basis of factual information. It is admired for its governance, but also for its editing wars, showing that the stakes can be as high as in any other international network. Wikipedia has more than a hundred policies and guidelines.¹¹⁸ These are all meant to enable the five pillars of the venture: Wikipedia is an encyclopaedia, written from a neutral point of view, it is free content that anyone can edit, use, modify and distribute, editors should interact in a civilized and respectful manner, and it does not have firm rules.

Every policy and guideline is best practice how to do things, and nothing is set in stone. That creates the freedom of mind to let anyone propose a guideline or rule on anything that may happen in this community. The way governance is described with best practices in these pages is among the best guides to implementing the rule of law that has ever been written. Naturally, the process of coming to a new guideline is guided step by step. How you can float an idea for a guideline, where to post that, whom to involve as stakeholders, how to formulate a request for comments, how to test whether there is enough support, how to move it to proposal stage, how others should ask questions and react, how independent editors can summarise the comments, what constitutes sufficient consensus, how changes can be implemented directly or after dialogue, and also how proposals and guidelines can gradually be removed because they become obsolete. Compliance with rules is governed by yet other sophisticated policies.

In the process, every single communication takes place on the Wikipedia pages themselves, completely transparent for everyone to follow. The Talk pages, which are linked to any wiki page, are one of the major tools for this. There is a great amount of equality in the process, but there are also clearly defined special roles that are assigned by the community, such as that of administrator, bureaucrat, steward and, if nothing else works, arbitrator.

Increasing transparency element by element

Empirical research confirms that opening up is a matter of carefully determining which elements of the process generally benefit from transparency and which ones are better off behind a screen.¹¹⁹ As common law opinions from justices suggest, publicity lets participants provide more rational arguments for their position and take into account the other parties' points of view. Public deliberation also creates more focus on the common good, in particular when the discussion is framed as what the group should do (rather than supporting an individual position), but it also invites simplistic answers to complex problems. Making concessions and revealing one's bottom line is difficult in any setting and less likely to happen in public.

Process design matters

Researchers found that the type of dialogue that takes place and its quality depends very much on procedure, so increasing transparency may well have to go hand in hand with reform of the procedure in the network.¹²⁰ Generally, the quality of deliberation is enhanced if power to decide is less concentrated. Positional posturing is more likely in a traditional legislation process where a proposal is defended and attacked. It helps if initial positions have not crystallized, suggesting that it is better to organise rulemaking processes around issues to be resolved and a number of goals to be achieved.¹²¹ Another element of process design is careful thinking about what can be disclosed at which stage by the facilitators of the process, so that participants are less likely to be framed as winners or losers by the media.

¹¹⁸ Retrieved on 23 August 2012 from http://en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines.

¹¹⁹ D. F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 *Annual Review of Political Science*, 497, at 513 (2008).

¹²⁰ *Id.*

¹²¹ L. Susskind, *Multiparty Negotiation* (2009); L. Susskind & J.L. Cruikshank, *Breaking Robert's Rules: The New Way to Run Your Meeting, Build Consensus and Get Results* (2006).

Transparency needed and innovation necessary

The bottom line is that transparency is valued, but not yet sufficiently practiced. There are no easy ways to increase transparency. Not everything gets better in the limelight. Research, and impressive achievements by some networks suggests that many of these dilemmas can be solved by redesigning processes and by carefully considering what to publish at what stage. But the big issue is perhaps not really on the table yet. Transparency for people actively taking part in the global economy is just a first step. However, the majority of people on the globe have far more difficulty to grasp what goes on in these English-speaking, highly professional and loosely governed meetings. They face language barriers, have a more hierarchical experience of governance abroad and face a load of other factors which prevent them from understanding these processes at such a level that they can begin to give their trust.

3.4 Accountability spread thinly



How accountable are these private, international networks for what they do? Bovens defines accountability as “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.”¹²² The ICH has only the EU, US and Japan as formal members. Yet ICH guidelines are used in Switzerland, Brazil and China because their companies want access to the global pharmaceuticals market, which is dominated by consumers from ICH members. How can accountability work here?

Transnational networks are elusive

These networks cross borders. Their members consist of experts. Hierarchies are generally purely procedural: someone needs to chair a meeting of the network, but formally there is not one person in charge of the other experts. The mandate of the participants and the limits of this mandate are usually not defined in national or international law; legally, many networks have no status. Because of this, accountability in transnational networks is less straightforward than in a state, a corporation or other legally well-defined entities. So if the ICH is to be held accountable, who should answer the questions and who exactly should face consequences?

Who is the forum?

Moreover, transnational governance networks have come together to find cross-border solutions for cross-border problems. This makes it hard to pinpoint what the forum is to which they are accountable, how they can explain and justify themselves to this forum, and what the measures are the forum can take if it is dissatisfied. Some networks produce rules, which affect many people in many places on earth. How should accountability be organised in such cases? Surely, there is a free press in many places and local and international NGOs abound, but which media and NGOs are effectively dealing with, say, rules regarding the registration of medicines? And it is also unclear whether an NGO can be regarded as legitimately representing a particular stakeholder group. In general, it is likely that there will not just be a single forum within which accountability plays out, but rather a number of forums and mechanisms that when taken together may ensure accountability.¹²³

¹²² M. Bovens, *Analysing and Assessing Public Accountability – A Conceptual Framework*, 13 *European Law Review* 447, at 456 (2006).

¹²³ T. Corthaut, B. Demeyere, N. Hachez, & J. Wouters, *Operationalising Accountability in Respect of Informal International Lawmaking Mechanisms*, in J. Pauwelyn, R. Wessel & J. Wouters (Eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, Chapter 14, (2012) (forthcoming).

A knowledge gap

Many transnational networks produce standards and guidelines that are highly technical. Food safety standards, financial regulation by Basel 3, aviation rules are all extremely important to the lives of ordinary citizens in many places, but which of them can claim to grasp these rules? Suppose there is a forum and the network explains and justifies the rules, but the forum doesn't understand. As noted elsewhere,¹²⁴ when the Basel Committee engaged stakeholders in its standard-setting process for Basel II, out of 259 comments there was just one comment from a community group.

HiIL Research Project | Informal International Lawmaking

Professor Joost Pauwelyn, Professor Jan Wouters, Professor Ramses Wessel

Leaders meet informally on an almost weekly basis. Their decisions affect livelihoods and businesses. Can citizens still hold them accountable? Heads of state join in a G20 framework. Presidents of national central banks have their Basel Committee. Regulatory authorities and pharmaceutical industry regularly meet to discuss scientific and technical aspects of drug registration and to set world-wide standards. In most cases only part of those affected by these processes are participating. For instance, until recently, even a major power such as Australia was not represented in the standardisation process for drug registration.

Although not legally binding, in real life the outcomes of these processes amount to rules of the game that stakeholders have to follow if they want to do their business. As a result, Australia did follow the drug registration standards. In 30 case studies on informal lawmaking in fields such as finance, health and the internet, the researchers laid bare what happens behind the closed doors of dining and conference rooms. Procedural rules and roles are not clearly defined. Leaders go to meetings without a precise mandate from the home front. Meetings are prepared without a formal secretariat. Note-taking and reporting are mostly organised ad hoc. Even so, participants find the processes highly effective.

Accountability is a major challenge. Clearer instructions from home jeopardize the flexibility that makes informal talks so effective. Monitoring the dealings of policy-makers in the international arena has always been difficult for members of parliament, but now they have to guess whether informal arrangements are in the making. Only if they know can they ask questions. The researchers suggest that objectives of meetings should be more transparent. Reasons for decisions should at least be published, as well as those for rejecting alternatives. The position of countries and stakeholders not involved can be improved by publication of the proposed decision and an invitation to send in comments.

Accountability in networks

Despite these challenges, networks give account of the rules they produce, some more so than others. There are various levels at which accountability is organised: in the network itself, at the domestic level and at the level of international organisations. Networks have developed a variety of internal accountability mechanisms. These include regular meetings with or reporting to external stakeholders such as the Basel Committee's report to the G20 on the global implementation of its standards,¹²⁵ and the publication of policy papers. Cross-border complaints mechanisms, such as those that have been established in advertising by EASA, constitute another mechanism.¹²⁶

¹²⁴ See para. 3.2., above.

¹²⁵ Retrieved on 23 August 2012 from <http://www.bis.org/publ/bcbs179.pdf>.

¹²⁶ See Paul Verbruggen, Case Study Report on Advertising. This case study is part of the HiIL research project Private Transnational Regulatory Regimes – Constitutional Foundations and Governance Design, led by F. Cafaggi, C. Scott and L. Senden. The case study is on file at the EUI, Florence.

Accountability in domestic order

Most people in rulemaking networks represent organisations: a (semi) government agency, a company, an NGO. They have at least some type of informal mandate from the organisation and are to some extent accountable internally for their actions and decisions in the network. A civil servant, for example, will have to explain and justify himself to his superior, who in turn must explain himself to a minister, who in his turn has to justify himself in parliament. Another mechanism is judicial review: the application of laws, which are based on rules produced by networks may be challenged before domestic courts. HiiL research suggests that the legitimacy of network rules increases if judicial review is an option.

When domestic accountability results in changes in the scope or application of transnational rules at the national level, the question arises whether this is desirable. After all, the point of transnational rules is to solve transnational problems, and uniform application may be necessary to achieve this end. In some areas (anti-doping criteria, solvability criteria for banks, etc.) derogation from transnational rules is clearly undesirable, in other areas (Best Practice Recommendations in advertising) a degree of derogation is unproblematic and intended.

Accountability in international organisations

At the international level, international organisations such as the WHO, the ICAO or the EU can have the authority to legislate in case they deem the output of networks unsatisfactory. An example is formed by the European Commission's interventions in regard of the EPC, which led to more stakeholder participation.¹²⁷

3.5 Litigation and access to justice coping with all these rules



What role do private safety standards or informal rules have in disputes? Courts come in when things go wrong. They determine whether a company acted negligently, whether the seller delivered goods that conformed to what the buyer might expect given the contract, or whether a defendant committed a felony as described in the criminal code. Lawyers and courts are used to debates in which different types of criteria are proposed. They use precedents from other courts, DIN, ISO and other safety norms, and now also criteria from private rule systems. Conflicts also arise in the process of making the rules. Increasingly, private rulemaking bodies create their own dispute resolution systems.

Increased complexity of litigation

Multilevel rulemaking complicates conflict resolution in and out of court because different rule regimes can apply to one conflict. Victims claiming compensation for damages may invoke safety requirements from soft law, whereas the defendants deny that these are binding rules and argue that they are only bound by the rules from the formal, national legal system. Similar issues can arise when companies apply for a license to operate their business or when they have a dispute about the quality of goods and services. Although there is little empirical research to support this, judges and lawyers tend to agree that the complexity of litigation is increasing. Whether rules tend to become more complex, or the process of determining facts is unclear, legal complexity is often mentioned as a cause of delay and high costs of litigation.

¹²⁷ See para 3.2., above and para. 3.7, below.

More criteria to inform litigation

On the one hand, the fact that litigation can be informed by transnational rules and standards benefits litigants and helps courts. On the other hand, the fact that there are often so many rules and standards in some areas (for example, around sustainability and the environment) raises a challenge for judges and lawyers.

Risk of more preliminary issues about applicability of rules

Following the traditional ways of coping with conflicting rule systems, a court may ignore one particular rule, saying it is not part of the body of rules that it can apply to the present case. A private rule, or even a standard used by lower court judges, is sometimes not seen as a binding rule by the supreme court. Or a court may try to find out which rule is hierarchically superior. The US legal system, for instance, obliges state courts to apply federal law, to decide the law of which state is applicable, but also to be the guardian of integral application of the legal system of another state. This requires an extensive system for dealing with conflicts of laws and is an open invitation to use the option of litigation about these preliminary issues strategically. If different venues for dispute resolution are expected to give different weights to norms, procedural regimes may also encourage defendants to argue that a court has no jurisdiction at all over the issue, and to start new litigation elsewhere.

Neutrality of private dispute resolution mechanisms

When designing private regulation, which may, and increasingly takes the form of a contract, the designers are also likely to make rules about the way disputes should be resolved. Many private mechanisms opt out of the public court system and choose private arbitration. In the United States, thousands of papers have been published about the risks, costs and benefits attached to mandatory arbitration for employment, consumer or securities issues. Empirical research suggests that private dispute resolution has lower costs and delivers timelier outcomes, whereas the outcomes may be slightly tilted towards repeat players.¹²⁸ One of the major issues is that arbitrators may be a bit more likely to please and develop an understanding for the positions of repeat players (from which they can expect more work in the future) than to be pro-consumer or employee.

Too many venues for accountability

Another complication can be that defendants have to appear before many different forums. One oil spill in Nigeria may be dealt with by courts in the US, in the Niger Delta and in the city in Europe where the company is incorporated. There may be a parliamentary enquiry here, a threat of criminal prosecution over there, several internal complaint procedures, an alternative dispute resolution (ADR) attempt by an institute monitoring rules regarding corporate social responsibility, and a complaint procedure under several private regimes for environmental damages. This can lead to extra costs and prolonged uncertainty about outcomes.

More of a problem-solving attitude

Following a state-centred way of thinking, judges guarantee that the rules of one state or one federation of states are applied in cases where the interests of that state are at stake. If, however, judges see themselves predominantly as having to solve a particular problem between the parties, dealing with legal complexity becomes easier.¹²⁹ Then they can live with a multitude of rules offering suggestions for a fair solution, rather than having to decide which of the rules is applicable. They can also leave it to the parties to propose the applicable rules, rather than having to ensure that all the right rules are applied. Studies suggest that judges increasingly have a problem-solving attitude and that this is supported by the users of courts.¹³⁰

¹²⁸ J.R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 *Stanford Law Review* 1631, at 1656 (2005).

¹²⁹ M. Lehmann, *Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws*, 41 *Vanderbilt Journal of Transnational Law* 381, at 425 (2008).

¹³⁰ J. L. Nolan, *Legal Accents, Legal Borrowing, The International Problem-Solving Court Movement*, 2009; D.B. Rottman & R.M. Hansen, *How Recent Court Users View the State Courts: Perception of Whites, African-Americans, and Latinos*, (2001); retrieved on 23 August 2012 from http://www.flcourts.org/gen_public/family/diversity/bin/perceptions2.pdf; Williamsburg VA, National Center for State Courts finding that a solid majority of the public backs new court and judicial roles associated with problem-solving and treatment.

Interpretative techniques

Another helpful way to cope with rules from many sources is an open approach to interpretation. Many courts now avoid issues of hierarchy between norms. For instance, they interpret their own rules in a way that is consistent with international human rights standards. This technique can also be applied to informal norms or to norms from private networks.

Networking and professionalisation

Judges increasingly exchange views and interact across borders. In our 2009 Trend Report on the changing role of highest national courts, we found at least 130 international judicial networks. These interactions are likely to create an increased understanding and willingness to consider foreign rule systems, but are also a natural platform for dialogue about ways to integrate private and informal norms from transnational regulatory networks.¹³¹ Together with the increased independence of courts from the executive, this perhaps represents a trend towards building an international judicial profession that is much better prepared to deal with multilevel rulemaking.

Stimulating informal harmonisation and simplification

Complexity creates incentives for simplification. When systems are too complex because the rules are coming from too many sources, leading to uncertainty and high cost of litigation, it is likely that new networks will be formed to do something about this. Whether this actually happens also depends on the incentives among the people having to work with the rules. An extensive literature argues that lawyers have an interest in complexity up to the point that dispute resolution becomes so burdensome that even wealthy clients start to turn away from the legal system.¹³² In situations where stakeholders can more easily organise themselves and have to deal with legislation frequently, they are more likely to start initiatives to simplify and to harmonise rule systems. So allowing or even stimulating competition between rule makers may also result in less conflict about rules because more is harmonised and simplified.

¹³¹ HiIL Trend Report, The Changing Role of Highest Courts in an Internationalising World (2009). Available at <http://www.hiil.org/publication/trend-reports-highest-courts>.

¹³² M.J. White, Legal Complexity and Lawyers' Benefit from Litigation, 12 Int'l Rev. L. & Econ 381, (1992); GK Hadfield, The Price of Law: How the Market for Lawyers Distorts the Justice System, 98 Mich. L. Rev. 953, (2000).

HiIL Research Project | Convergence and Divergence of Legal Systems

Professor Pierre Larouche

Lawyers tend to respond to divergence between legal systems by proposing to harmonize matters. The question is whether top-down harmonization is always the best method to deal with divergence. The research project “Convergence and Divergence of Legal Systems” aimed at understanding the ways in which national and other actors and legal systems (should) cooperate in responding to societal challenges through law.

Through various case studies and theoretical interdisciplinary analysis, the researchers provide insights into the best strategies for (national) legal systems to cope with the phenomenon of multilevel governance.

Traditionally, regulators are faced with the choice between two options: they either do nothing and leave the market to deal with a specific problem, or they opt for top-down harmonization that leads to the replacement of laws of each legal system by a single law common to all these systems. Whereas the first approach can only work in certain cases where no externalities are involved and the costs of divergence are limited, top-down harmonization results in significant distortions and costs.

As an innovative third option, the researchers propose the strategy of “legal emulation”. Legal emulation is a new form of cooperation between national and supra-national legal actors, such as regulatory agencies, legislators and courts when regulating a particular issue. Legal emulation denotes convergence of legal systems in a bottom-up fashion and as such it is the opposite of convergence through top-down harmonization. It is not merely a theoretical concept; it is already used in practice, such as in regard of human rights review at different levels in Europe and in regard of the creation of networks by EU Member States in the area of competition. Key tools for achieving the best solution are information pooling, mutual-learning, stakeholder participation and benchmarking. The strategy or mechanism of legal emulation involves three assessment steps with which all legal actors involved are capable of achieving convergence without top-down harmonization:

- Step 1: The issue or question has to be clearly defined, taking into consideration the objectives to be achieved with regulation.
- Step 2: A number of legal orders are analysed in order to evaluate how they deal with the issue at stake, which leads to a number of options.
- Step 3: These options are compared and analysed with a view to the objectives set out in step one as a result of which a particular regulatory response is chosen.

Through this process of comparative analysis and learning a legal actor may opt for a particular solution, which may incorporate different elements from other legal orders. In such a case a certain degree of convergence is achieved without the high costs that are connected with strict top-down harmonisation.

Weighing of solutions

Patrick Glenn and Paul Schiff Berman, leading scholars following the trends in multilevel rulemaking are now developing proposals to stimulate intermediary, weighed solutions.¹³³ Why not encourage courts to develop a hybrid rule that does not necessarily correspond to any particular national regime? One country may set damages at a high level, another one at a lower one. An in-between solution is possible. In this way, disputants do not become the victim of long debates about the legal status of different rules. Sometimes, as in international bankruptcy proceedings, these intermediary solutions are now even laid down in protocols negotiated between stakeholders under the supervision of judges.¹³⁴

Supervision of private dispute resolution systems

Criticism regarding the impartiality of arbitration and ADR is having effect. After all, these systems are private organisations needing customers. So ADR providers now increasingly offer due process protocols with guarantees for neutral, independent decision-making.¹³⁵ A next step may be that ministries of justice start supervising dispute resolution providers, or that a transnational private network starts to enforce standards for this.

3.6 Avoiding bureaucracy by smart compliance

No enforcement powers



“Law does not have its full effect unless there is enforcement. That is what the state does better than any other entity.”¹³⁶ When Professor Fukuyama said this to our Scenario writing team, he meant that, ultimately, the state can enforce compliance through its courts, police force, and if need be its army. Private actors do not have that option when they set rules or standards. This does not, however, mean that transnational governance networks are toothless. They can monitor compliance and use other means to enforce, like using trust and reputation. But there are challenges.

Private audits

Many regulatory regimes developed by private actors rely on quality control by private firms that carry out regular audits. These audits can be used for technical standards as well as commitments of social corporate responsibility (social audits). In food safety, government agencies that have an inspection role in some countries recognise these audits as authoritative and either stop inspecting or carry out inspections less frequently. Gap Inc. is a company that specialises in compliance mechanisms.¹³⁷ Big auditing firms are training their staff to be able to monitor the ISO 26000 standard on sustainability. Though not audits, reports by serious NGOs, like Human Rights Watch in the field of human rights are also a form of private, non-state monitoring.

¹³³ P. Schiff Berman, *From International Law to Law and Globalization*, 43 Columbia Journal of Transnational Law 485, (2005); Idem, *Global Legal Pluralism*, 80 Southern California Review, 1155, at p. 1231 (2007); H. P. Glenn, *Sustainable Diversity in Law*, 3(1) Hague Journal on the Rule of Law, 39-56 (2011).

¹³⁴ R.J. Silverman, *This Cross-Border Insolvency Cooperation Protocols*, 33 Tex. Int'l LJ 587, (1998); J. Altman *A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency*, 12 San Diego Int'l LJ 463, at 493 (2011).

¹³⁵ C. Drahozal & S. Zyontz, *Private Regulation of Consumer Arbitration*, 79 Tenn. L. Rev. 289, at 292 (2012).

¹³⁶ Francis Fukuyama, *HiIL Law of the Future interview*, 10 May 2011, retrieved 23 August 2012 from <http://www.innovatingjustice.com/blogs/the-state-will-change-but-it-will-not-disappear>.

¹³⁷ Retrieved on 23 August 2012 from http://www.gapinc.com/content/gapinc/html/investors/corporate_compliance.html.

Private sector tools

Although it is only early days, the private sector is also developing monitoring and compliance tools. WorldCompliance has developed software to help financial institutions monitor their client database for risk categories such as terrorism, money laundering, and drug trafficking, and sanctions.¹³⁸ Lexis Nexis has a developed a “due diligence dashboard” that helps to vet potential business partners.¹³⁹

Peer pressure

Peer pressure is used as a means for ensuring compliance among “members”. The Electronic Product Environmental Assessment Tool (EPEAT) registry shows publicly for each manufacturer what the environmental rating is of an electronic device, for all to see, including the competitors.¹⁴⁰ Ratings, such as the one used by the Global Perceptions Index or the World Justice Project, create nervousness among peers and pressure not to underperform in neighbour countries. In the area of financial regulation, political pressure (often exerted by organisations such as the IMF) is used as a means to have third parties comply. It is used in areas such as financial regulation. The recommendations and guidelines are therefore in most cases de facto binding, also on third parties, affecting national policies, banks and other financial institutions, and consumers of financial products.

Complaints procedures

Compliance can also be achieved through third party complaints procedures. An example is the Fair Labor Organisation, a multi-stakeholder initiative involving universities, NGOs, and twenty affiliated brand-name companies with the aim of promoting adherence to international labour standards in the production of apparel. It consists of investigation, reporting, recommendation, and mediation in complaints against firms. The sanction is negative publicity.¹⁴¹ Another example is Social Accountability International (SAI), a multi-stakeholder organisation on labour standards. In 1997, SAI launched SA8000 (Social Accountability 8000), a voluntary standard for workplaces, based on ILO and UN conventions. With the standard, SAI also offers a complaint resolution programme.¹⁴² The European Advertising Standards Association also offers assistance regarding complaints.¹⁴³

High administrative costs of compliance with overlapping mechanisms

There are many complaints about overlapping compliance mechanisms. Sometimes compliance is monitored by both audit companies hired by private actors and by government agencies. For example, in many countries compliance with food safety standards is the subject of government inspections as well as audits by specialised firms. While it is better to have too much than too little compliance, especially in such areas as food safety, double compliance is not ideal either. It is not efficient and can lead to high costs for companies if they have to acquire two certificates or licenses and have to report to two groups of auditors asking slightly different questions. Authorities and private watchdogs may also have different interpretations of the standards that need to be upheld, causing confusion and legal costs.

Complaints about lack of cooperation

Whether monitoring agencies from different regulatory regimes cooperate is left to them. Some observers note that cooperation in the area of enforcement is underdeveloped. Nestlé subscribes to ten forums that have set standards connected to its sustainability strategy.¹⁴⁴ It would be quite a success, if these networks would coordinate compliance monitoring and if some of them would perhaps merge in the future. In the competitive rulemaking environment this is likely to happen, but in the meantime, administrative costs can be huge.

¹³⁸ Retrieved on 23 August 2012 from <http://www.worldcompliance.com/en/default.aspx>.

¹³⁹ Retrieved on 23 August 2012 from <http://www.lexisnexis.com/en-us/products/due-diligence-dashboard.page>

¹⁴⁰ Retrieved on 23 August 2012 from <http://ww2.epeat.net/searchoptions.aspx>.

¹⁴¹ Retrieved on 23 August 2012 from <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pagelD=490&parentID=472>.

¹⁴² Retrieved on 23 August 2012 from <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pagelD=1173>.

¹⁴³ Retrieved on 23 August 2012 from <http://www.easa-alliance.org/Complaints-compliance/page.aspx/9>.

¹⁴⁴ Retrieved on 23 August 2012 from

<http://www.nestle.com/csv/Compliance/globalprinciplesandgoals/Pages/globalprinciplesandgoals.aspx>.

HiIL Research Project | National Constitutional Law in a Globalising World

Professor Leonard Besselink

International organisations, states and NGOs invest heavily in treaties and other rules of international law. National courts are crucial to give effect to these rules. But judges may be hesitant to do this, because of the way they see themselves as guardians of the constitutional separation of powers.

Treaties and international rules are usually negotiated by diplomats from the ministry of foreign affairs or from other ministries. This is the executive branch of government, and the legislative branch (parliaments) is not always involved. So courts may hesitate to apply international law norms in domestic cases, or take these norms less seriously than the ones coming from their national legislators. In most countries, the application of international rules is seen as a matter of constitutional law. This research project explored how courts perceive their mandate to import international rules into a purely national context. It focused on four different legal systems: the United States, the United Kingdom, France, and the Netherlands.

Every constitutional and legal system has its own way to respond to international law. Political, social, and historical forces combined produce different tolerances in the scope of powers exercised by judicial, executive, and legislative organs, and in their mutual equilibrium. However, courts are cautious in exercising their constitutional powers. They prefer an explicit constitutional provision for recognising international law as national law. In other cases, international law is treated as a non-binding aspirational standard. Implications for "sponsors" of international law

Generally, national judges feel they have at least some discretion whether to accept international rules or not. International organisations, states or NGOs that want to see international rules implemented in the national legal orders should not assume that their international norms will be easily domesticated. They may have to think about ways to:

- Make sure these norms are turned into national legislation;
- Design their rules in such a way that they can be easily incorporated into the national legal texts;
- Influence how judges view international law, by participating in the debate about the constitutional status of international rules;
- Show and explain to judges that their laws have added value and bring more equitable results compared to what the national rules have to offer.

Compliance ineffective

In some regimes, compliance is not very effective. In July of 2012, Apple withdrew from EPEAT, a global standard environmental footprint rating system for electronic products, developed with producers, consumers, governments, environmental NGOs, and academia.¹⁴⁵ It is reported to have done so because its latest star ship laptop, the Macbook Pro with retina display, would not meet the highest EPEAT standard.¹⁴⁶ The network can now either revise its standard or live with the loss of impact because a major electronics producer has pulled out and is not compliant. In December 2011, Global Witness, a leading NGO in the extraction industry, pulled out of the Kimberly Process because it felt that consumers could still not be sure whether the diamonds they bought were so-called blood diamonds or not; according to Global Witness, compliance was below par.¹⁴⁷

¹⁴⁵ Retrieved on 23 August 2012 from <http://epeat.net>.

¹⁴⁶ Retrieved on 23 August 2012 from <http://www.infoworld.com/t/mac-laptop/does-apples-abandonment-of-epeat-mean-its-going-less-green-197306>.

¹⁴⁷ Retrieved on 23 August 2012 from <http://www.globalwitness.org/library/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable>.

Separation of powers or incentives for effective and low cost compliance?

In many transnational governance networks the entity that sets the standards or makes the rules also monitors compliance. This is true for IGOs like the IMF and the WHO and the financial and health standards they set, but also for private rulemaking bodies like the Kimberly process. This can raise issues of independence. At the same time, it is efficient to keep compliance close to the standard-setting mechanism, because that entity will know best what to look for and it will have the trust of the stakeholder group that set it up. Moreover, a standard-setting network has incentives to monitor compliance effectively and to keep compliance costs low. Otherwise it will lose trust or its members walk away. So separation of powers between legislative and executive branch has perhaps to be reconsidered, or defined in a new way.

Borrowing compliance capacity from the state

If private networks are very successful, they can involve the state institutions for monitoring and compliance. Standards that are developed by governance networks can find their way into national law, quite specifically or more indirectly, after which they can be enforced through state mechanisms. The Dutch corporate governance code – the Code Tabaksblat – was prepared and adopted by private actors. Later, the ministry for economic affairs set up a commission to monitor compliance and to enhance use of the code.¹⁴⁸ The International Accounting Standards Board publishes on its website a list of countries that have adopted its global standards in formal laws.¹⁴⁹

Borrowing compliance capacity from individual contracts

Standards or soft law rules can also be incorporated as general sales conditions or as requirements in labour, supply, or other contracts. These are then monitored for compliance with as ultimate sanction termination of contract or litigation. In the Sustainable Agriculture Initiative thirty companies from the food and beverage sector formulated standards and practices for sustainable agriculture, in consultation with civil society. These standards are now part of Unilever's Sustainable Living strategy¹⁵⁰ and through that, part of the responsibilities of Unilever staff and of commitments it asks from its huge network of contractual partners.

Deregulation is no answer; innovation cutting the costs of compliance is

High costs of compliance are perhaps one of the biggest threats to multilevel rulemaking. Filling in forms and getting data together to answer questions from bureaucrats is something we all hate. All these rulemaking bodies, each trying to survive in the competitive market for making the best rules, impose costs on business together, even if each of them individually organises things efficiently. Private interests may use these arguments to get rid of rules with which they have difficulty complying. Deregulation is not likely to be the answer, because regulation works and is needed. The challenge is to make it smarter, in particular at the stage of applying rules. Innovation in making compliance less costly to monitor and to enforce is ongoing. It should be stimulated.

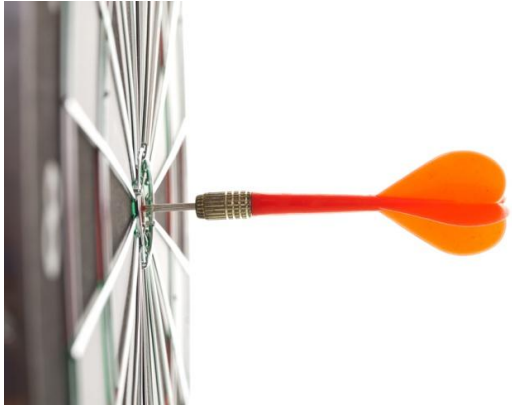
¹⁴⁸ Retrieved on 23 August 2012 from <http://www.commissiecorporategovernance.nl/Information%20in%20English>.

¹⁴⁹ Retrieved on 23 August 2012 from <http://www.ifrs.org/Use+around+the+world/Use+around+the+world.htm>.

¹⁵⁰ Retrieved on 23 August 2012 from <http://www.unilever.com/sustainable-living/sustainablesourcing/>.

3.7 Rather effective?

A European Payment Area - SEPA



The EPC has not yet succeeded in creating a SEPA in which every good or service can be paid for via credit card, debit card, bank transfer or direct debit as efficiently as it happens within countries.¹⁵¹ That is what all experts agree on. But it is far more difficult to assess whether this is to be seen as a failure of multilevel rulemaking. Since the inception of this idea, foreign cards are accepted in many more shops, usually enabled by networks of contracts between banks. The standard set by SEPA is still very much a leader in this rulemaking environment.

It has been formally accepted by the EU, and is now due to be implemented on January 1, 2014, although non-Euro countries may delay this for two more years if necessary. According to the European Central Bank (ECB), 28.2% of Euro payment transactions in Europe now follow the SEPA standard (May 2012).

Costs and benefits for participants

One of the reasons the SEPA regime has been slow to be accepted is reportedly the size of the compliance costs for consumers and business. Corporations need to install new software for the processing of payments, change letterheads in order to include new IBAN bank account numbers and to inform their relations about this. Given the lock-in effects in the payments industry, very low economic incentives for individual clients, and difficult to change paying habits, SEPA did not succeed as a purely self-regulatory project and needed the full support of the EU commission and, eventually, implementation in legislation.¹⁵²

Each participant makes a personal regulatory impact assessment

Private regulation is difficult to achieve, because every single participant needed to make the system work should benefit from it. Every person involved should perceive he or she can save costs, lead an easier life, get a better reputation, avoid sanctions or earn more money by it. But this is also one of its secrets. In a way, each of the stakeholders performs his or her own individual regulatory impact assessment and votes with his or her feet if the result is not positive. In this way, private regulation also uses the information available at the level of the people involved, avoiding one of the sources of regulatory failure. The sum of all these individual assessments determines the success of the regulatory scheme and ensures that overall benefits and costs are weighted.

Public authorities coming in: External effects or public goods

This weighting of private benefits and costs does not ensure, however, that all effects on third parties become part of the equation. Simplifying trans-border payments encourages trade and travel across borders within the EU and that may be a public good. Having to change our habitual ways of dealing with bank account numbers has some costs now, but our children and grandchildren may benefit from this far into the future. That may explain why the EU came in with its legislative power. By making the system a legal standard, the Commission effectively increased the costs of not participating.

¹⁵¹ A. Janczuk-Gorywoda, *Case Study Report: Payment Systems*. This case study is part of the HiIL research project Private Transnational Regulatory Regimes – Constitutional Foundations and Governance Design, led by F. Cafaggi, C. Scott and L. Senden. The case study is on file at the EUI, Florence.

¹⁵² Idem.

HiIL Research Project | Private Transnational Regulation: Constitutional Foundations and Governance Design

Professor Fabrizio Cafaggi, Professor Linda Senden, Professor Colin Scott

Companies can take private regulation initiatives, but can also wait to be regulated by national or international government agencies. These regulators have the option to take action, or to leave the initiative to other actors in the rulemaking process. What are the trade-offs here? What guarantees are in place for accountability and transparency?

Individual states have a limited capacity to regulate cross-border activities. International law does not contain many rules that apply directly to the activities of MNCs. So private regimes have to offer protection. Can citizens rely on these regimes to protect their interests? What is the legitimacy, quality and effectiveness of such regimes and their enforcement mechanisms?

The project has developed a framework for assessing different regulatory regimes, based on a literature review and empirical analysis in the context of eleven case studies. It contains four dimensions: effectiveness, legitimacy, quality and enforcement. This can help regulators and policy-makers to determine when and under what conditions regulation can be left to the private sector or when (parts of) it require public interference. Companies can use such a framework to facilitate their choices, or as a benchmark for their regulatory regimes.

Recommendations per case study and across sectors have been generated as well. In most cases the norm-setting process has some shortcomings. Transparency and participation are not always guaranteed, which affects the beneficiaries of the regulation, but sometimes also the interests of companies not involved in the rulemaking process. In other cases, private rulemaking seems to be the way forward.

In the area of data-protection, multinational companies have resorted to Binding Corporate Rules (BCR). They offer employees and consumers the same level of protection in every country. They accept responsibility and offer local access to a dispute resolution mechanism, for complaints about data handling by any of the subsidiaries anywhere in the world. They ask one lead-regulator to deal with them, so both regulators and companies can save administrative costs.

Companies can take the initiative and go for private regulation, or wait and see what regulators do. Regulators can choose to issue norms, or leave room for private regulation first, adding protection where they think this is necessary. In reality, the situation is often even more complicated, because national and EU regulators can both take action, or different national regulators can regulate the same activities. Moreover, industry groups from different continents (US and EU) can try to take the lead, or even come with competing norms.

The result of these interactions is that many cross-border activities are governed by a patchwork of rules from different sources. Sometimes these rules compete, many times they will build on each other, one rule maker trying to fill the gaps left by the other ones. Whether such a patchwork of rules gives a sufficient level of protection is not so easy to establish. The framework developed in this project may be a first step towards measuring and evaluating the quality of these hybrid regulatory regimes.

Competition and cooperation: Who can claim ownership and success?

We found some indications that this caused mixed feelings at the EPC. Was this cooperation, where other lawmakers helped to make SEPA a success? Or was it fierce competition, where the costly standards were appropriated by another rulemaking body, without the benefits going to the EPC? Perhaps both perspectives are equally valuable, showing there is a serious issue of who can claim the authorship of standards, in a setting where reputation as a good rule maker is one of the few benefits that are available. In this case, authorship was shared. Both the Commission and the EPC started referring to SEPA as a co-regulatory regime, showing also how private and public regulation can be intertwined.

Legitimacy through better participation

Another finding has been that EPC's and SEPA's legitimacy has been affected by a lack of sufficient participation by some stakeholders.¹⁵³ The ECB, and in particular the Commission have repeatedly called upon the EPC to involve all relevant stakeholders in the SEPA standard-setting process. Eventually, this provided more participation in the SEPA regulating process for consumers and suppliers (non-binding suggestions for changes in the SEPA schemes). Two stakeholder forums have been created: the SEPA Cards Framework Group and the Customer Stakeholder Forum, whereas the ECB and the Commission established the SEPA Council as another forum in which both the demand and the supply side participate. This experience fits nicely with the large body of literature that shows how legitimacy enhances compliance and how legitimacy is increased by making procedures more fair, giving more voice and participation to people affected.¹⁵⁴

Many examples of effective private regulation

Although the effectiveness of SEPA has been challenged, Professor Cafaggi and his team found many examples of private transnational regulation that are considered to be effective. The following regimes are not seriously criticised in evaluations and in the research literature, or by experts in multilevel regulation, which is at least some measure of their effectiveness:¹⁵⁵

- Asia-Pacific Economic Cooperation (APEC),
- ICH
- ISO 14001
- FSC
- IATA¹⁵⁶
- International Standard for Business Aircraft Operations (IS-BAO) which has been generated by International Business Aviation Council (IBAC)¹⁵⁷
- BCR for data protection.¹⁵⁸

Moreover, a meta-analysis of case studies found indications that governance systems comprising many agencies and levels of governance yield higher environmental outputs than monocentric governance.¹⁵⁹

The unknown graveyard of regulatory initiatives

These are rather salient examples of TPR, but they have to be considered with some caution. Successes are much more visible than failure. We did not systematically investigate the graveyards of websites and regulatory initiatives that did not make it. Moreover, there is no way to estimate the number of problems for which a private regulation process would have helped but never took off in the first place. So we are not yet in a position to really learn from failure.

¹⁵³ See preceding note.

¹⁵⁴ See, e.g., T. R. Tyler, *Why People Obey the Law*, (2006).

¹⁵⁵ See, e.g., F. Cafaggi, *New Foundations of Transnational Private Regulation*, EUI Working Paper RSCAS 2010/53; T. Hale & D. Held, *The Handbook of Transnational Governance: Institutions and Innovations* (2011).

¹⁵⁶ F. de Londras, *Case Study on Civil Aviation*. This case study is part of the HiIL research project *Private Transnational Regulatory Regimes – Constitutional Foundations and Governance Design*, led by F. Cafaggi, C. Scott and L. Senden. The case study is on file at the EUI, Florence.

¹⁵⁷ Idem.

¹⁵⁸ See above text box TPR project Cafaggi, page 57

¹⁵⁹ J. Newig, O. Fritsch, *Environmental Governance: Participatory, Multi-Level – And Effective?*, 19 *Environmental Policy and Governance* 197, at 210 (2009).

Sustainable models for financing private regulation

Anecdotal evidence from our networks, however, suggests that many regulatory networks suffer from serious funding problems. This is confirmed by literature showing that successful networks often receive at least initial funding from governments or major NGOs, indicating that it is indeed very difficult to let beneficiaries of rules pay for the use of them.¹⁶⁰

Kimberley Process: Partial effectiveness and conflicting interests of key stakeholders

A now controversial example of private international legislation is the Kimberley Process (KP), which aimed to stop the flow of conflict diamonds. In 2000, in response to the violent civil wars in Angola, Sierra Leone and Liberia, diamond-producing states symbolically met in Kimberley, South Africa, to design a solution to eradicate the trade in conflict diamonds. Only shipments of diamonds in a closed box with a certificate showing their mine of origin, can be traded, cut and sold to end-users. The scheme relies on self-reporting by states (and through these by companies involved in the diamond trade), as well as peer review. Although the scheme certainly contributed to diminishing the trade in conflict diamonds,¹⁶¹ it has been criticised lately for its failure to ensure effective compliance and independent monitoring.¹⁶² Global Witness, one of the NGOs that partnered in setting up the scheme left it because the governments of Zimbabwe, Côte d'Ivoire and Venezuela have not faced sanctions for their infringements. Stakes are high for these governments, and the example perhaps shows the limits of any international regulation scheme, rather than a particular failure of informal, international rulemaking.

Maritime Stewardship Council

The opportunities and the limits of effectiveness of private certification mechanisms are also visible in the case of the MSC. In June 2012, it had certified 168 fisheries as sustainable, which are catching over 7% of the wild fish harvested in the world. Fish coming from fisheries that meet the criteria of the MSC can be sold under the MSC label, so customers can opt to buy either sustainable or non-sustainable fish. The regime was introduced in response to dissatisfaction with the state-based multilateral fishing governance regime, which, according to the creators, did not sufficiently protect global fish stocks.¹⁶³ The regime is criticised for giving certificates to some 10 fisheries, suggesting that its accountability mechanism works, and that the regulation regime is rather effective for the other ones. But what about the scope of the scheme?

Too high costs and too little perceived benefits for fishermen in developing economies

The MSC has thus far failed to penetrate in the developing world, and especially Asia, which consumes two-thirds of the world's seafood. One reason for this is that the administrative costs for certification are considered too high for (small-scale) fisheries in developing countries. Certification requires scientific data that are hard to come by. Moreover, an MSC certificate is not a sufficient benefit for small-scale fishers who are able to sell their products to local markets anyway. For them, the MSC certification is not part of a viable business model (in the short and mid-term), although it certainly would benefit their sons and daughters taking over their boat in the future.

Effectiveness hard to assess

Generally, the research assessing private, informal regulation suggests it often works. We cannot conclude with any confidence why it does not work under some circumstances, but the patterns suggested by the perspectives discussed in Chapter 2 seem to be relevant. Effectiveness is likely to be related to the costs and benefits for each of the participants of following the norm. Participation in the process, the way external effects or public goods are taken care of (by NGOs or public authorities) and the financial sustainability of the regulatory regime. As the Kimberley process shows, a lack of a credible reaction to non-compliance is also a threat to effectiveness.

¹⁶⁰ T. Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 13 *American Journal of Sociology* 297, at 321 (2007).

¹⁶¹ See, C. Kantz, *Kimberley Process* in T. Hale & D. Held, *Handbook of Transnational Governance*, at 302-8, (2011).

¹⁶² V. Vidal, *Case Study on Informal International Lawmaking: The Kimberley Process' mechanism of accountability*, in J. Pauwelyn, R. Wessel & J. Wouters (Eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness* (2012) (forthcoming).

¹⁶³ T. Hale, *Marine Stewardship Council*, in T. Hale & D. Held (Eds.), *Handbook of Transnational Governance*, at 310 (2011).

4. Changing roles of Professionals



4.1 Rule makers in parliaments see their jobs change

Members of parliament have to cope with ever more competing rule makers



In the highly competitive rulemaking environment of the 21st century, members of parliaments see that their jobs are changing. They can no longer assume that every rule applicable in their country will be shown to them first or at least to other national rulemaking bodies. This is an old issue because of rulemaking by international organisations. But it was never solved. The proliferation of informal processes and private law makes this problem even more urgent. The main option members of parliaments now have to keep an eye on rulemaking is to engage with informal processes (dialogue with experts, with civil servants, interactions facilitated by NGOs). But there is more change in the arenas that have been the centre of rulemaking for at least 100 years.

Less attention for rulemaking in parliament

The trends in multilevel rulemaking coincide with a drop in attention for legislation in parliaments when compared to other activities. One indication of this is that in many European countries the proportion of lawyers in parliaments decreased. In Italy, it went from 27% in 1948 to 12% in 2006, in France, from 40% to 5%.¹⁶⁴ These are not uniform trends, however. China saw the number of lawyers increasing, and the same is true for some African countries. This suggests that there may be a stage in which countries are building up a body of formal laws, and one in which the scope for rulemaking by national states is diminishing.

Comparative advantage of parliamentary rulemaking

In a setting of multilevel rulemaking, members of parliaments have to compete with many other rule makers. So they have to reflect on their comparative advantage. Compared to a private rulemaking body, parliamentarians can easily get exposure for a new rule. They also have a unique position because they can give rules the stamp of being accepted by the people in a country. Moreover, national state legislation can still be relevant in some areas of governance. On the other hand, a member of parliament will have to struggle to get information, which is easily accessible for private rule makers or for regulatory agencies. Resources for drafting, consultation, negotiation with stakeholders and communication strategies are likely to be rather limited.

Simple issues, one rule solutions

One strategy for members of parliament can be to focus on rather straightforward issues for which there appear to be simple solutions. One of the dangers of such an approach is that parliaments micromanage such isolated issues, just because they get exposure by dealing with them.

Open-ended rules and principles

Another possible approach is that parliamentarians focus on general principles, leaving the concrete rules to other rule makers. A disadvantage is that the burdens of rulemaking are shifted to the phase of application of the rules, and this may be inefficient.

¹⁶⁴ M. Malatesta, *Italian legal Elites*, in Y. Dezalay & B.G. Garth (Eds.), *Lawyers and The Rule of Law in an Era of Globalization*, (2011).

Resources matter

More sophisticated rules, with a combination of detailed substantive criteria, procedures and monitoring processes, are more likely to be left to private rule makers. When national rule makers tackle a major problem, such as the health care system, they have to free up substantive resources for the rulemaking procedure, including extensive consultation processes with experts and stakeholders.

Creativity needed

A member of parliament is in a good position to initiate rulemaking by engaging relevant civil society organisations, government bodies and private actors around a problem and inviting them to contribute to new rules. He or she can also encourage and see to it that the executive where appropriate takes a back seat and allows civil society and private actors to come up with rules rather than try and design them at a ministry.

Design of legislative procedure impacts position of formal legislation

The design of the legislative procedure may influence how well the formal legislation process performs in comparison to private and informal rulemaking processes.¹⁶⁵ A member of parliament must have a comparative advantage for those who want to have rules made. In the US, the number of lawyers in congress is unusually high (37,6% in the House and 60% in the Senate in 2008), perhaps because rulemaking always has been more like a private entrepreneurial activity by legislators rather than a task of considering proposals from the executive branch. This is an example of a jurisdiction that can still produce very extensive and complicated statutes, such as the infamous Dodd Frank legislation of 2010 counting 2319 pages. In Canada, the influence of members of parliament on legislation allegedly increased, partly because of new rules promoting private member bills.¹⁶⁶ One reason informal rulemaking is proliferating, is also the deadlocks that can exist in parliaments. The increased polarization in US Congress is a case in point.

4.2 Legislation professionals need new strategies

Ensuring coherence and user friendly laws



Legislation professionals are mostly lawyers. They tend to see it as their task to ensure rules are concise, understandable, coherent and easy to find for those who have to apply the law. They take care laws have specific formats, using standardised concepts, proceeding from article to article, often starting from definitions, then to substantive principles, organisational rules and procedural rules. In times that rulemaking was centralised in the nation state, they could take for granted that lower level legislation by ministries and local government entities would build on their definitions. Courts were

expected to interpret statutes, so each decision can be linked to an article, clarifying the meaning of one of its words. Legislation professionals from different ministries can coordinate, and ensure that their laws follow the same formats.

New Strategies

This may not have been entirely realistic in the past, but when many rule makers compete, legislation professionals certainly cannot ensure this type of coherence any more. Moreover, the relevance of national laws is diminishing in many areas, because of international law and transnational regulation. So how do legislative professionals cope with this?

¹⁶⁵ D.F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 Annual Review of Political Science 497, at 500 (2008).

¹⁶⁶ K. Blidook, Exploring the Role of 'Legislators' in Canada: Do Members of Parliament Influence Policy?, 16 The Journal of Legislative Studies 32, at 37 (2010).

We detected a number of strategies:

- Ensuring at least the law they are responsible for is coherent and easy to find, more or less ignoring what other rule makers do.
- Incorporating sets of rules from international rule makers because there is an obligation to do so.
- Informal coordination, where legislation professionals learn what other lawmakers are doing, participate in each other's consultations, and decide whether to proceed or to leave issues to other rule makers, in order to spend scarce resources wisely.
- Copying rules from private or international lawmakers, including courts, when useful.
- Copying rules from rule makers in other countries.
- Entering open delegation clauses in laws, providing the private sector with the authority to regulate.
- Investing in meta-rules, which can decide which rules are applicable for which issue, for instance by designing classical rules of private international law.
- Coordination efforts between legislation professionals from different rule makers leading to agreements to use the same concepts.
- Incorporating sets of rules from other private or international rule makers by formally accepting them without an obligation to do so.

We did not find signs of a number of other strategies, because they are not part of the international legislation tradition. But they may already be in use by innovative legislation professionals.

- Copying of rules with reference to where they have been taken from.
- Reference to similar rules in other countries that may be useful to compare for the user of the laws.
- Mergers between rule systems, in which the best rules from two or more systems are made into one.
- Systematic efforts to abolish rules because other rules have taken over their role in practice.

Codification projects become less attractive

Legislation experts tend to be proud of comprehensive statutes and codification. Almost every country has a consolidated set of civil procedural rules, a criminal code and a code of criminal procedure. Some countries also have encompassing statutes for environmental law or a civil code regulating contracts, property and family law. These projects tended to take long, to usurp many resources and have been very infrequent in the history of legislation. Often they have been led by academics, interested in underlying principles and teaching the law in a coherent way. What can be the future of codification in a world with many competing rule makers? This is another issue legislation professionals will have to think about.

Hiil Research Project | National Resistance against the Europeanisation of Private Law

Professor Jan Smits, Professor Martijn Hesselink

The EU has harmonised many rules in the past decades. Private law, governing private and commercial transactions and used most frequently by most people, is not among these areas. What are the reasons for this? This project researched the role of two factors that may influence harmonisation efforts: national culture and the burdens for individuals of having to cope with different legal systems.

The EU has been relatively successful in harmonising national laws between its member states. However, it has failed to obtain full support for its ambition to harmonise family law, contract law, property rights. This project investigated the underlying reasons for the resistance to harmonising laws governing personal relationships and commercial transactions.

A first hypothesis is that private law is a part of national culture and this explains the resistance. This is not an easy issue for research. Many European citizens may identify with their respective national cultures. Nevertheless, citizens can also have local, regional or religious identities. The prevalence and the intensity of cultural identities are difficult to measure, as is the impact on policy debates in Brussels or elsewhere. A historical analysis provided a partial answer. In most European countries, codification of private law coincided with the rise of the nation state in the 19th century. Having a civil code was part of building a new nation. Therefore, it is not surprising that traces of ideologies from the nation-building era are still detectable in some of the arguments employed. For instance, the possibility of further harmonisation of private laws is objected to based on the argument that private law should remain at the national level or that law is part of the national traditions.

It is generally assumed that the unification of private law will positively affect the decisions of business and consumers (clarity about applicable law, less room for conflicts) leading to an increase in cross-border transactions. But how does diversity of legal rules affect the choices consumers and businesses make? Based on organisation theory and the psychology of decision-making, it is likely that different groups of consumers and firms exist on which the legal diversity has a different impact. One group will not consider at all transacting cross-border, or will have other reasons, such as an inclination to buy goods made at home. A second group will be rational, making choices based on a few criteria, such as price, quality or colour, neglecting other information such as the legal risks involved.

The only relevant group will consist of those who take into account whether there will be legal remedies against a foreign seller. But even for this group, it is uncertain whether it is actually more difficult to protect your rights in your own country compared to getting access to justice according to the laws of another country.

What are the implications for international organisations keen on simplifying and harmonising the laws governing private transactions? It may be that the momentum for European harmonisation has gone. In the decades after the war, there was a need to build a common European identity. Harmonisation of private law could have become a goal of this movement.

On the issue of the burdens of differing legal regimes, more empirical research is needed. The research suggests these burdens may be lower than expected. This can partially explain why harmonisation is not successful. Another possible reason is that the system of private law is used by a large group of lawyers, judges and businesses on a day-to-day basis. Changing this system “wholesale” means they all have to change their working methods, for gains that are hard to quantify. Harmonisation of rules for a specific group of businesses has less overall costs. The benefits of changing the regulation for a company’s core business can be much clearer and quantifiable.

Principles and terms of reference

Codification efforts have been supplanted by the laying down of principles. We have seen principles of international criminal procedure, principles of European contract law and restatements of US tort law. These projects are interesting and useful. It is, however, not clear whether there is a clear demand for this type of rulemaking from practice and from universities.

HiIL Research Project | General Rules and Principles of International Criminal Procedure

Professor Goran Sluiter

International criminal courts each have their own particular procedural rules. Our researchers compared them and formulated best practices. And they formulated more than 50 suggestions for improving these procedures.

Each international and internationalised criminal court or tribunal has its own procedural rules. What can they learn from each other and where do differences lead to problems? In this early stage of developing international criminal procedure, much is still unknown. Some rules exist on paper, but are not yet applied or explained by any of the courts. Other rules and procedures, while shared between all the courts, are rather open ended. They do not give much guidance to the potential users of the rules. Differences in the formulation of other rules leads to inconsistencies in the procedures of the different courts.

This is the outcome of this HiIL research project which was conducted in cooperation with the University of Amsterdam. It is the world's first comprehensive review of criminal procedure in international criminal law. To overcome the deficiencies, the researchers, including experts from international courts and tribunals, have formulated more than 50 recommendations for improving rules in regard of every phase of international criminal procedures.

4.3 Corporate lawyers leading the way

A level, predictable and effective playing field



Corporate counsels at MNCs tell us they have a number of bottom-line parameters for all rule systems: (1) they must create a *level playing field* (rules apply to and are enforced with respect to all); (2) the rules must be *clear and predictable* (no unclear rules or rules that keep changing); and (3) they must be *effective* (they must do what they were made for). This does not necessarily represent the full range of thinking in business environments. Single companies or business units may benefit immensely from rules that give them a kind of exclusivity, keep new entrants away from the market or fit their particular way of distributing products.

But, by and large, and in the long run, the interests of most businesses move in the direction of a level playing field with high benefits from and low costs of applying rules.

Interviews with business leaders have also shown us that, generally, within these parameters, business is not too concerned whether the rules come from a state, an international organisation, an industry association, or any combination of those. In fact, anecdotal feed-back has been that business is even willing to accept higher than normal standards – for example, relating to clean air – if the three requirements are met.

Struggling to stay in control

The problem in the transnational area is that the three requirements are very often not met. Creating an “owner” of a transnational problem who will work to align the generally wide array of interests to “regulate” the problem in line with the three requirements is frequently quite difficult. Some companies may have a lot to lose from changing the rules, becoming formidable barriers to innovative regimes. Companies are then often faced with a very diverse playing field, with conflicting rules, rules that are vague, that often change, and that often only relate to narrow national requirements.

“Multinational enterprises are often faced with a choice between two illegals. An example: the US Dodd-Frank Bill requires complete disclosure of all fees (royalties, tender fees) that are paid in contacts with governments. In other words, the law of the US says: “tell us”. In China, we are faced with the exact opposite. There, the information described above is confidential, a state secret. So in China they say: “keep it to yourself”.”¹⁶⁷

Peter Rees, Legal Director of Royal Dutch Shell

In other cases there are many organisations that act as the owner of a problem, and perhaps even too many of them. For instance, rules and standards in the field of corporate social responsibility (CSR) are set by: Global Compact, OECD MNE Guidelines, OECD Due Diligence Guidelines, ISO26000, ISO 14000, standards under the Extractive Industries Transparency Initiative, the Ruggie Framework and certainly a number of other bodies that did not appear on our radar screen.

Solving one problem at the time

When in a particular field there is no level playing field, rules keep changing, and rules are not effective, business will resort to risk management and politics. That is also clear from our interaction with business. Striving for clear and uniform applied rules will then be deemed to be less relevant. Business will work to influence decision-making by lobbying politicians in *their* concrete case, relating to *their* concrete problem. This could involve a race to the bottom or a race to the top, without much coordination with other business.

Initiating a more efficient set of rules

A second strategy for strategic decision-makers in businesses can be to work towards the creation of a regime that works. In the area of corruption, international business has a lot of interest in a level playing field and has participated in processes that developed international instruments. With the help of international law firms, businesses table proposals for regulation and work to have them adopted. Law firms have considerable resources and expertise to build common legal standards. For instance, law firm De Brauw Blackstone Westbroek from Amsterdam is heavily involved in the design of a transnational private regulatory regime (BCR) in the field of privacy and data protection related to data transfers between group companies.¹⁶⁸

Shopping for optimal rules

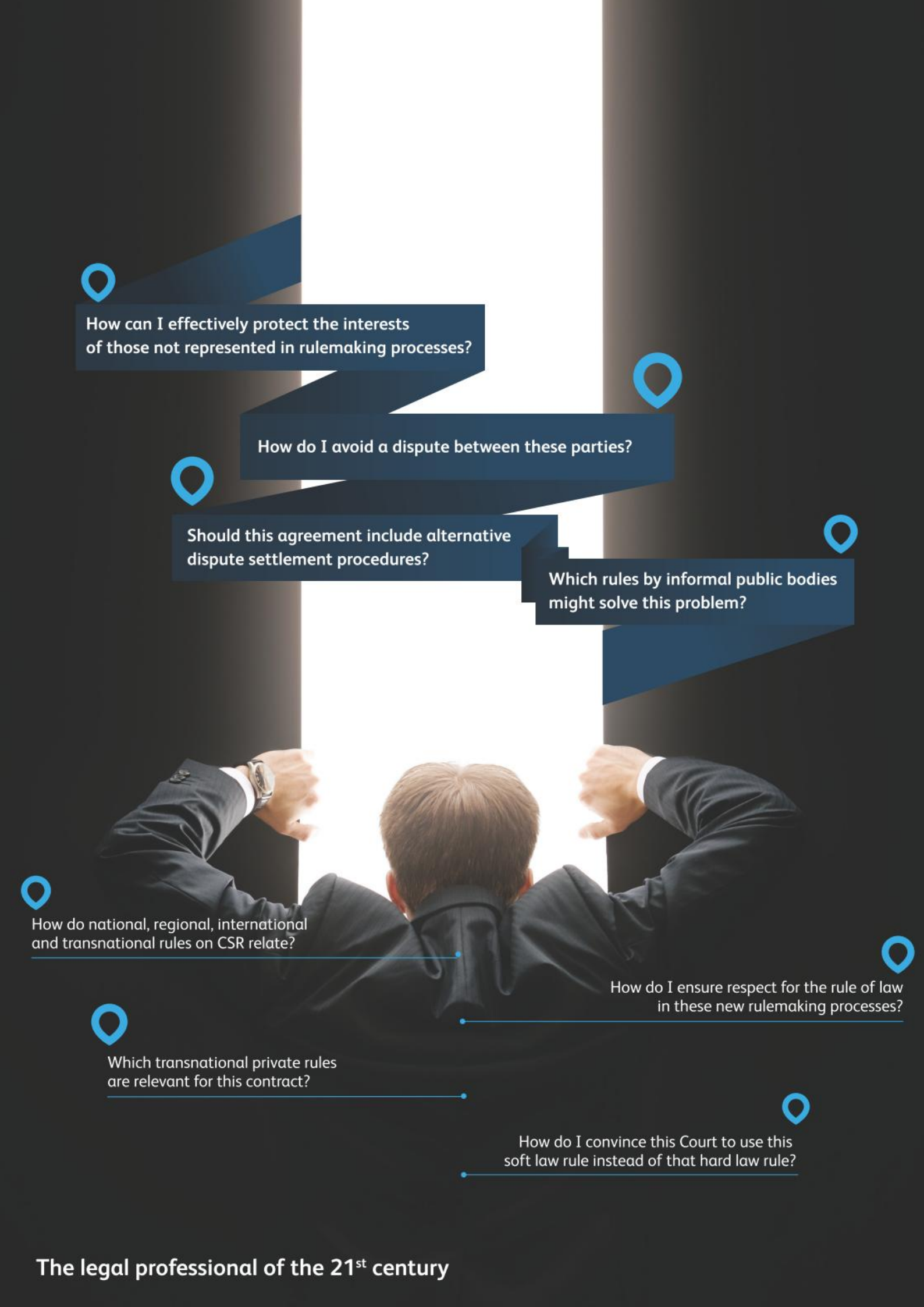
Business can also make use of the fact that a playing field is not level. It can then opt to do some things in states where regulation is absent or light, while doing other things elsewhere. Sometimes this leads to a rather formalistic approach: “We comply with the law so leave us alone” – without recognition of the fact that the laws in questions are outdated, that the judiciary in a country is not the most effective, and that there is limited access to justice.

Being rule champion

In the area of CSR, a strategy has also been to voluntarily agree to the highest standards, as a way to convey a positive image of the company in the competition on the market and to prevent claims of violation of a standard. Companies like Nike, AHOLD, Unilever, and Nestlé consciously use the fact that they comply with high labour, environmental, and human rights standards as part of their corporate positioning.

¹⁶⁷ Retrieved on 23 August 2012 from <http://www.lawofthefuture.org/blog/2011/07/25/373/>.

¹⁶⁸ L. Moerel, Binding Corporate Rules: Corporate Self-Regulation of Global Data Transfers, OUP, (2012).



How can I effectively protect the interests of those not represented in rulemaking processes?

How do I avoid a dispute between these parties?

Should this agreement include alternative dispute settlement procedures?

Which rules by informal public bodies might solve this problem?

How do national, regional, international and transnational rules on CSR relate?

How do I ensure respect for the rule of law in these new rulemaking processes?

Which transnational private rules are relevant for this contract?

How do I convince this Court to use this soft law rule instead of that hard law rule?

4.4 Judges and lawyers cope if they specialise

Judges cannot be expected to know all the rules



National judges and lawyers do not encounter rules and standards, which originate from outside the national legal system on a daily basis. In the EU, judges are expected to know and apply EU law also when the parties do not invoke these rules. But when surveyed in Germany and the Netherlands, most judges were not aware of EU law issues. They tended just to wait and see what parties bring in (see text box) showing it is unrealistic to expect that judges know all the relevant rules in the cases they decide.

HiiL Research Project | National Judges as European Community Judges

Professor Mark Wissink, Professor Fabian Ambtenbrink, Professor Marc Hertogh

National judges are expected, both by “Brussels” and nationally, to apply EU law consistently in the cases they deal with. However, this theoretical legal construction does not take into account the practical problems that national judges experience when applying EU law, such as a combination of time constraints and a lack of routine. Additional training of judges could help in solving this matter.

EU law has an increasing influence on numerous fields of national law in the EU member states. From an EU perspective, national courts act as EU courts when a case is to be decided that touches upon an area in which EU law is relevant.

However, these expectations may not necessarily coincide with the way in which EU law is applied in practice or with the perception of the European legal order by national judges in the EU member states.

The pan-European challenge of application of EU law by judges in national courts is at the same time a very personal or local one. Delivering a judgement without adequately taking into consideration relevant EU rules, leads not only to an inadequate outcome but might also result in a lengthy and costly appeal procedure for all actors involved.

The research team looked at the experience of Dutch and German private law judges with the (non) application of EU law through interviews and questionnaires. It concluded that EU law played only a minor role in the daily work of most judges in lower courts. Furthermore, judges generally felt they didn’t know as much about European law as they should. However, the fact that they rarely apply EU law is not necessarily caused by a lack of knowledge. Rather, non-application is often caused by a lack of time to take EU law into consideration combined with the awareness that, if EU law is relevant, this will be applied by appeal courts.

The recommendations of the research team include:

- Training courses for judges on increased awareness of areas in which EU law may become important in their daily work;
- Building and maintaining an online database that enables national judges to retrieve information on how their colleagues in other Member States have solved similar problems in relation to EU law. Such a central tool would provide necessary information to national judges when applying EU law.
- Establishing coordinators as contact points for EU law at German courts. These coordinators already exist in the Netherlands.

This is different when judges specialise; judges and lawyers who work only in labour law issues refer to relevant EU law much more frequently.¹⁶⁹ At this level, transnational rules and standards do not constitute the basic rules upon which a national court case is decided.¹⁷⁰ They mostly have an indirect significance: they are used as an interpretative or “factual tool” that is attached to the hook of a national or international law provision. For example, a general due care provision in a tort case is loaded with international accounting standards or industry best practices (see also paragraph 3.5).

But transnational rules and standards may appear more often

A leading expert in the field of mass claims, Deborah Hensler, sees the emergence of a “collective redress norm”, based on which injured groups get “more generous compensation for losses, in a wider variety of circumstances.”¹⁷¹ This process towards transnational recovery of damages is likely to continue. The losses she refers to are connected to the global market economy: faulty products, environmental harms, human rights violations – all connected with activities that have occurred in many different countries.

Judges are then confronted with a national or international law provision of a general nature that is to be loaded by a cluster of transnational standards and rules: industry or other guidelines, codes, best practices, declarations. These cases are very complex to manage effectively. Firstly, the local court could be just one of other venues to which the case is brought. Often a number of cases relating to a single type of harm or incident are brought before courts of a number of countries.¹⁷² The judge thus has to keep an eye on what is going on in other jurisdictions. Cases involving large harms are often brought through large law firms or networks of law firms and civil society organisations. Compared to them, the judge may be under-resourced.

Emerging strategies?

Judges have to find ways to cope with this. A first thing we note is a growing body of statements of best practices.¹⁷³ Simply put: “Large claims for dummies” manuals, in which experiences and road maps for claims are set out.

A second issue is that judges lag behind other legal professionals when it comes to specialisation.¹⁷⁴ The group of law firms specialised in large international class action claims is small; it is a complex area of law and being specialised obviously pays off. National judiciaries could make sure there is a specialised *corps* of judges that can deal with complex international class action claims that usually involve the applicability of rules and standards originating from different jurisdictions and levels of governance. Besides experience in rule conflicts and international conflict resolution, these judges would have to have had sufficient international exposure, speak foreign languages, and have good networks. We have seen that this is a difficult issue for many judiciaries: they have limited funds and there is a tendency to allocate resources to generalists who can deal with all kinds of cases. It is questionable whether this strategy is sustainable into the future.

¹⁶⁹ T. Nowak, F. Ambtenbrink, M. Hertogh, M. Wissink, National Judges as European Union Judges, at 81-88, (2012) retrieved on 23 August 2012 from <http://www.hiil.org/publication/national-judges-as-european-union-judges>.

¹⁷⁰ See A. Nollkaemper, *IN-LAW in Domestic Courts*, in J. Pauwelyn, R. Wessel & J. Wouters (Eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness* (2012) (forthcoming).

¹⁷¹ D. Hensler, *How Economic Globalisation is Helping to Construct a Private Transnational Legal Order*, In *The Law of the Future and the Future of Law Volume I* retrieved on 23 August 2012 from http://www.fichl.org/fileadmin/fichl/documents/FICHL_11_Web.pdf.

¹⁷² Famous cases include the Jewish Holocaust claims, see, e.g., <http://www.jewishvirtuallibrary.org/jsource/Holocaust/claims1.html>, and cases brought against Shell by Nigerians in several jurisdictions in relation to damage resulting from oil spills in the Niger Delta, including in Nigeria, The Netherlands and the United Kingdom; See, e.g., *Nigeria villages sue Shell in UK court over oil spills*, retrieved on 23 August 2012 from <http://jurist.org/>; *Nigeria: Dutch court to try Shell for oil spills*, see <http://washafrika.wordpress.com/2010/01/04/nigeria-dutch-court-to-try-shell-for-oil-spills/>.

¹⁷³ Retrieved on 23 August 2012 from http://www.pcacpa.org/showpage.asp?pag_id=1059; http://www.isitc.org/publish/showDoc.cfm?contentId=0000005207_001_20090702.pdf for claims on financial transactions. For FIDH paper on how victims can file cases in the context of the ICC: <http://www.fidh.org/Victims-Rights-Before-the->

¹⁷⁴ HiIL Trend Report: Basic Justice Care, retrieved on 23 August 2012 from <http://www.hiil.org/publication/Basic-justice-care>.

We saw in paragraph 3.5 that there is a general trend towards judges taking on the role of problem solvers instead of mainly deciding legal issues. Presidents of courts, heads of judicial training schools, and even legislators can work to strengthen this. Transnational rules and standards can be seen as tools in their toolbox. The ultimate goal is then to reach a solution that works for the parties, that is acceptable for the wider public, and that roughly fits into the relevant national legal systems.

4.5 Justices in highest courts: change is coming



Highest courts are there to provide a last resort of legal protection. They do a final check whether rules comply with fundamental rights. And they ensure coherence, a certain harmony in the application of the law. Clients of the justice system must feel that all cases are treated more or less alike. For this, it helps if lawyers work from the same principles.

The fear is that courts would interpret the same rule differently, thereby undermining the legitimacy of the rule, of the courts, and ultimately of governance using the rule of law.¹⁷⁵

Coherence with what?

When the “law” is no longer the laws adopted at the national level by parliament or courts, but comes from many directions, the coherence issue becomes confusing. Transnational rules inspire rules adopted at the national level. Setting uniform standards is often their aim, but only for a limited number of problems. This is no Napoleonic codification; it entails working on problems one by one and dropping solutions into national legal systems, hundreds per year, unsystematically, each with its own philosophy. How can all this ever be consistent? And is consistency really something to worry about beyond equal treatment of similar cases?

Selection bias?

Highest courts usually work from case to case, solving more general issues only if they come up in one specific case. They do not systematically monitor the way the laws of a country develop. They select cases, or have developed intricate ways to determine whether an issue is one of law or of fact. Generally, they focus on the formal, national legal system and on the issues that have been debated within these systems. They are unlikely to select problems with rules from informal networks, so many of the developments discussed in this report do not directly affect them.

¹⁷⁵ M. Claes & M. de Visser, Are You Networked Yet? On Dialogues Within European Judicial Networks, 3 Utrecht Law Review 100, (2012); M. Gelter & M. Siems, Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten European Supreme Courts, 8 (2) Utrecht Law Review 88, (2012); and E. Lazega, Mapping Judicial Dialogue across National Borders: An Exploratory Network Study of Learning from Lobbying among European Intellectual Property Judges 8 Utrecht Law Review (May 2012); A. Lollini, The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law respectively at 100-114, 88-99, 115-128 and 55-87, retrieved on 23 August 2012 from (<http://www.utrechtlawreview.org/index.php/ulr/issue/view/23/showToc>); see also E. Benvenisti & G.W. Downs, Going Global to Preserve Domestic Accountability: The New Role of National Courts in S. Muller & S. Richards, Highest Courts and Globalisation, (2010); M. Scheltema, Changing Role of Highest Courts: Concluding Observations, in S. Muller & M.A. Loth, Highest Courts and the Internationalisation of Law, (2009).

Strong impact of international law

But highest courts are very active in dealing with issues of international law. The German constitutional court is now dealing with potential conflicts between national constitutional law and European law on an almost daily basis. Courts all over Europe refer cases to the EU Court of Justice and hundreds of thousands of cases reach the European Courts of Human Rights in Strasbourg. It is clear that these procedures coping with multilevel rules take a lot of energy and time.

Does hierarchy still work?

Highest national courts operate on the basis of hierarchy. They are at the top of it. They have the power to issue an interpretation of a law that becomes *the* interpretation. They guard the hierarchy of rules by ensuring that the constitution overrides a “normal” law. That does not really work in the current setting. Between different highest national courts there is no hierarchy. Still it looks strange if different highest courts interpret international rules in different ways.

Moreover, in areas where transnational private networks are dominant, it is a bit odd if a national highest court in Cyprus or Berlin says that a certain rule agreed by stakeholders, experts and government representatives from many countries is invalid. It is perhaps also the multilevel rulemaking environment, with all its specialisation and flexibility, which explains why some Europeans find it unacceptable for the European Court of Human Rights to state that a certain national rule is invalid because of a problem with one particular view on what falls within the scope of a human right - forever, and without any option to challenge this or to hold this court accountable.

New strategies?

So there are many reasons for highest national courts to rethink their strategies. Does it really help if they act as the guardians of national legal systems? What should be their focus as ultimate protectors of rights? How to cope with hierarchy and the other challenges of multilevel rulemaking? There is no evidence that highest national courts or governments are terribly concerned by this. Decisions of highest national courts do not show a dramatic increase in explicit references to transnational norms, international treaties, or national rules/rulings of other countries. We also do not see a widespread drive to amend national constitutions to change the role of highest national courts. But these are old institutions, that are difficult to change, focusing on dealing with individual cases, without strategies, missions or visions of the future. Coping with caseloads is perhaps their strategic priority.

HiiL Research Project | The Changing Role of Highest Courts in an Internationalising World

Professor Ton Hol, Professor John Bell, Professor Andrea Lollini

The main objective of the research project was to answer the questions whether transnational coherence in judicial decision-making is taking place, how and why. To answer these questions, legal comparatists, sociologists, political scientists and legal theorists worked together in this project. Both theoretical and empirical research methods were employed. The main outcome of the project is that there is a tendency towards transnational coherence of judicial decision-making.

This is, however, not a result of a practice of cross-citation. Although courts cite cases of foreign courts, this takes place first and foremost between courts of legal systems that demonstrate a strong relationship, e.g. the courts of the common law countries and the courts of Germany and Austria on the continent. Several limitations on this practice were identified: language barriers (which make a general and systematic comparison difficult), lack of knowledge of foreign legal systems, important principles of the rule of law which require that judges are bound by national law, not foreign law (as opposed to international law), and may not develop new rules, and the connected consequence that foreign decisions may therefore provide support for a decision of the domestic court and can thus be useful, but do not have justificatory force. Still, some interesting observations are made showing under which conditions courts are more open to transnational “referencing”. Courts in countries with new democracies, such as South Africa and the countries of Central and Eastern Europe, are more open to foreign law than the courts of other countries. These courts do cite the decisions of foreign courts more frequently than other courts do, which is a result of the past: the rather problematic status of the legal infrastructure of the regimes before democratisation incentivizes these courts to legitimise their decisions through “referencing”.

The tendency towards transnational coherence of judicial decision-making results primarily from “judicial dialogue” through judicial networks. The study shows that these networks are growing. This applies especially to those regions where judges do have special incentives to “network”, as in the EU where judges from the different member states have an interest in developing a common understanding with regard to European law. This has resulted in a paradigm shift. It is no longer merely in a hierarchical way that legal development in Europe is coordinated by the decisions of the European Court of Justice, which are applied in a top-down way by the highest national courts. Because of the rise of strong networks it is increasingly in a horizontal setting that legal decision-making by adjudication is shaped. But these networks go beyond the EU, such as a global network of constitutional courts, the Network of Constitutional Courts of Asia etc. In all cases, the networks have the general aim to promote and develop a common legal culture. Apart from EU law related networks, judges working in the domain of civil and commercial law will also have a strong incentive to cooperate with each other, because of the often international or transnational character of commerce itself.

The notion of judicial dialogue seems to best describe what is happening at the transnational level in terms of judicial cooperation and a trend towards coherency. Judicial dialogue through networks leaves space for a kind of autonomy of the courts, thereby circumventing formal limitations on judicial cooperation. In concluding, the researchers observe that because of internationalisation, judges have to participate in these networks if they still want to be able to do their job properly.

Judicial networks enhancing international coherence

But now look at what highest court justices do. They started networking as well. We found no less than 130 judicial networks, mostly around specific legal fields (constitutional law, administrative law, patent law, corruption, human rights), around certain institutions (constitutional courts, administrative courts, appeals courts), or around legal families or languages (Arabic, francophone, Commonwealth, civil law). These networks take the form of conferences, workshops, websites, and Linked-In pages.¹⁷⁶ By being “connected” and through the dialogue that that can bring, there is more awareness of overarching issues, which can be used as “inspiration” for decisions. They exchange judgments. Some highest national courts are feeling a need to speak to an international audience: the French *cour de cassation* and *conseil constitutionnel*, as well as the German *Bundesverfassungsgericht* translate key decisions in English. No, these networks do not issue guidelines and best practices for highest courts activities. Not yet.

Broadening the scope of what law can be monitored and applied

Another approach that can empower highest courts to find a new role is that national legal systems adopt a more broad definition of what the “law” is. One that defines more broadly what rules highest courts should and can apply. A modest example: Article 39 of the Constitution of South Africa says that in interpreting the Bill of Rights, courts “must apply international law,” and “may consider foreign law”. Private international networks, producing informal rules, do not yet pass this test, though.

Revisiting proposals

Some highest courts revisit proposals to improve the reasons given for decisions and to allow dissenting and separate opinions. Perhaps “hierarchy” is no longer the reason why a court decision is followed, so “authority derived from reasoning” must replace it. Better motivation can help, as well as more transparency about the different factors that carry or do not carry a decision. This makes courts part of a dialogue. Another manifestation of this are proposals to make more use of the “amicus curiae” instrument. If parties affected by the case, but not directly involved, can submit their views, the knowledge of private rulemaking networks can be mobilised. But some proposals seem to be at odds with the interactive, more horizontal rulemaking trends, such as ideas to unify all highest courts in one country, whereas specialisation seems to be the future.

Judges as lawmakers?

In one sense, multilevel rulemaking also makes judges’ lives easier. They have often been accused of setting general rules without democratic legitimacy. In a world where everyone makes rules - regulators, private networks, international conferences, standard-setting agencies – without much involvement of elected parliaments, they become less special. As long as they do not have the final word.

¹⁷⁶ See T. Hol, J. Bell and A. Lollini (eds.), *Highest Courts and Transnational Interaction*, 8(2) *Utrecht Law Review* (2012). See also M. de Visser and M. Claes, *Judicial Networks*, in: P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization: New Role, Continuing Relevance* (2012) (forthcoming).

5. The Future of Rulemaking



5.1 Can we Trust Multilevel Rulemaking?

Living under global rules

We are living in a global legal environment. But it is not run by a neatly organised global rulemaking body, as was predicted immediately after the Second World War, and perhaps hoped for again in the 1990s. The number of formal, multilateral treaties in which states agree to binding rules is decreasing. And national parliaments seem to spend less time and effort on legislation now than in the past. The weight of rulemaking activities has shifted elsewhere. Whereas the 1990s saw the advance of the regulatory state, when national agencies massively entered the rulemaking scene, we now see hundreds of transnational networks and informal organisations take up rulemaking tasks. World leaders, regulators, civil servants, business people, NGOs, corporate lawyers and leading judges meet in conference rooms across the world. They produce criteria, norms, guidelines and standards that help to make goods and services reliable, or protect privacy, the environment and human rights.

Produced in many different ways

All these different rule makers are now designing and improving the rules of the game. Every activity we can think of has its own rules and standards. Rule makers and standard-setting bodies try to make issues more clear, to correct mistakes, to fill gaps, to harmonise, to simplify things or to coordinate them in a better way. The different rules overlap, build on each other, compete, and occasionally send out conflicting messages. No-one on the planet can confidently say he or she knows all the relevant rules on a particular topic. There is no place where all rules are registered. Rules seem to come from every direction.

As by-products of other activities

For the participants in these processes, rules are mostly tools to achieve other goals. They do not set rules as part of their mission. Their company may benefit from rules because they drive out poor quality competition, or because a certain standard gives them a competitive advantage. Members of parliament have to show they are doing something about an issue that is in the media. Regulatory agencies want to show they are in control and that they are needed, and have to set criteria against which they can monitor activities. Judges design norms when they give reasons for decisions. We will have to live with the idea that rules are not produced with only the common good in mind. An organisation just wanting to produce rules to achieve the greatest value for all would even have difficulty surviving. Good rules are costly to produce and very difficult to sell for money.

National state is not in direct control

The quality of the rules is not guaranteed by the rulemaking mechanisms of the national state. Most of the rules that have effect in a country are designed elsewhere. They are not even formally accepted by the national legislator. Lawmakers in government and in parliament simply lack the capacity to participate in every process and scrutinise every rule.

Trusting this is hard

Why would a member of the general public trust that the sum of all these rulemaking processes protects their interests in a sufficient way? Each of these processes is not very visible for people outside these conference rooms, and even less so for the average citizen in Beijing, Rio or Cairo who does not understand English. Rulemaking is likely to be dominated by special interests and people from faraway countries. Citizens, consumers or employees are often not represented. Even in an area which is heavily regulated by many different bodies, rules can prove to be inadequate, and sometimes very much so, as in the case of regulation of the financial sector. The national state, for most people still the primary venue for concerns about rules, is clearly not in control. Psychologically, trusting rules now more or less requires trusting people everywhere else on this globe. Surprisingly, many people do not question the globalisation of law production. Understandably, many others experience anxiety and are attracted to populist views warning against the foreign bodies that determine how we lead our lives.

Multilevel rulemaking works

Multilevel rulemaking would not be so ubiquitous if it did not work well in many cases. People rely on it every day. They take a plane, eat anything that comes from the shelves of a supermarket, even when they travel to distant countries, and pay their pension premiums when they are 25, relying on the fact that this will get them a sufficient income at 70. This report shows that there are indeed a number of fairly good reasons to trust these new rulemaking processes.

Accountability is an asset

Many companies and other organisations have a genuine interest in being accountable. By telling people what they can expect they create trust. Reliability increases the value of their brands and their shares. Cheating by one company affects trust in the entire sector. So these organisations have good reasons to participate in networks that help the sector to be accountable. Increasingly, organisations are expected to show on their website how they will treat employees, local communities, customers and others impacted by their activities.

In the shadow of the court of public opinion

Besides, private and informal rulemaking processes take place in a global open society, where every rule and every outcome can be scrutinised by many independent experts, NGOs, politicians and journalists. In the internet era, each of them can mobilise the court of public opinion with a few tweets or posts on a website. Most organisations participating in informal and private regulation will do anything to stay out of that court. The threat of damage to their reputation is a powerful incentive to regulate honestly in a way that gives people genuine protection.

An international regulatory profession

Another safeguard is that the networks create new checks and balances themselves. Judges, regulators, experts, law firms and other lawmakers increasingly gather in their own networks, slowly becoming a global profession. Mark Bovens and Deirdre Curtin found that by interacting with their foreign counterparts, civil servants build common values and ideas about fair procedures for rulemaking.¹⁷⁷ Judges hearing about good practices from elsewhere, for instance, become more committed to implementing these in their own countries than to listening to the special interests represented in their courtrooms. Gradually, rulemaking, organising compliance and conflict systems are being based on international best practices. Once basic policy choices have been made and priorities have been determined, the rule systems to achieve this can be designed in an evidence-based way.

Warning signs

However, there are also factors which, when present, justify a skeptical attitude towards the effectiveness or fairness of multilevel rulemaking. Suppose you are the member of the board of trustees responsible for the quality of the legal system in one country, speaking for the broader population of citizens and owners of small to medium-sized businesses. In this role as the imaginary trustee of the system, when should you be worried about the current global rulemaking processes? We mention seven signs of possible trouble.

Interests not aligned

Multilevel rulemaking is likely to be more effective and produce desirable outcomes when the interests of key actors in the making and enforcement of rules are in line with the interests of those regulated, for instance consumers. For instance, retailers have a strong interest in food safety – the financial and reputational risks when things go wrong are obvious – and it does not differ from that of consumers and governments. When key actors in the making and enforcing of rules have different interests, there is more reason to be concerned about the quality and effectiveness of the rules. When it comes to the level of salt or sugar in food, for instance, officials from the state and international organisations like the EU will favour low levels for public health reasons whereas most of the industry favours keeping levels relatively high for reasons of taste.

¹⁷⁷ M. Bovens & D. Curtin, *The Real World of EU Accountability: What Deficit?*, (2010).

Shifting responsibility

Private actors sometimes just wish to be relieved of the need to think about the consequences of their choices (aside from their commercial implications). So they create rules in order to be relieved of responsibility. Sometimes this is part of the motive behind the desire in business for “legal certainty” or “the need to reduce compliance costs”. In the best-case scenario, firms are then being naïve about policy discussions and about the willingness of states and citizens to allow them to focus strictly on profit. In the worst-case scenario, firms are using these claims to get the result they want on substance, i.e. no regulation or very favourable regulation. This window-dressing is difficult to detect, but it may be one of the reasons why some private rulemaking mechanisms fail to reach their objectives although they have all the relevant knowledge about what works on the table.

Final outcome not easy to monitor for the public

The quality of multilevel rulemaking critically depends on scrutiny in an open society. It helps if outcomes are clear. For instance, a medicine that is allowed on the market but kills a number of patients is a clear indication of poor regulation. In the financial sector, desirable outcomes include sufficient credit for companies, safe deposits, reliable returns on investments for pensioners, low inflation and high economic growth. If pensioners get squeezed in the rulemaking process, they cannot easily organise pressure and oversight through NGOs and parliamentary representatives.

Regulatory capture

A trustee would also look at the risk of regulatory capture. If a few companies or stakeholders dominate the issue from one side, whereas the interests of the other side are very dispersed and individually insignificant, that risk is high, so there is more reason to monitor the process. Additional (neutral) expertise, involving state regulators and avoiding job-hopping may be a remedy.

Warning signs:

- When stakeholders want different final outcomes;
- When responsibility is apparently shifted from stakeholders to rulemaking bodies;
- When outcomes are difficult to monitor;
- When regulatory capture is hard to avoid;
- When citizens and users are not well organised and represented;
- When new threats emerge; and
- When a problem cannot be quarantined.

Citizens and users not well organised and represented

Another risk factor is that those who are affected by rules are not well organised and represented in regulatory schemes. Then the quality of the rules may suffer, because their interests are not well understood, or do not get sufficient weight in the deliberations.

New risks

Threats that are not yet sufficiently understood may not be covered sufficiently by multilevel rulemaking. Environmental threats or new diseases need to be researched first in order to assess the size of the risk. It is unlikely that major businesses have a sufficiently direct interest in addressing these risks head-on, so this may be an issue for which regulation is lagging behind the need to do something about it.

Option of closing country is not available

Leaving issues to private regulators or to international coordination is also a matter of sound risk management. For some issues, the option of national regulation is always open, because countries can insulate themselves from spill-over when things go wrong. For example, if mad cow disease breaks out somewhere, borders can be closed for meat from abroad. In other areas spill-over effects cannot be avoided. So there is more need to monitor and participate in informal rulemaking early on.

Developing a set of minimum standards

A widely agreed upon and used minimum standard for the quality and effectiveness of multilevel regulation is not yet available. Best practices for regulators and outside stakeholders – public officials, judges and NGOs – have not yet been compiled. Some sets of basic criteria are currently being developed, also in the context of HiIL's research programme, where Professor Cafaggi's research group is looking at a framework with the general dimensions of quality, effectiveness, legitimacy and enforcement of private regulation.

5.2 Fundamental New Roles for the State

"Law does not have its full effect unless there is enforcement, and only the state can, in the end, provide that. There is no other, better mechanism".

Francis Fukuyama

Stimulating effective multilevel rulemaking

Multilevel rulemaking fundamentally changes the role of the national state. Effective rule production will increasingly become a matter of empowering, monitoring and participating in networks, rather than designing and drafting rules of national law. Leading thinkers predict a new separation of powers, now between policy formulation and rulemaking in networks, and constituent and veto power in institutions that are authorised by and accountable to citizens.¹⁷⁸ If a problem arises, the first question proponents of better rules should answer is how they can stimulate the necessary activities of rule makers in such a way that the problem will be solved in an effective way. Of course, meaningful participation in international rulemaking processes can be achieved by using existing procedures and working methods.

Redesigning processes for rulemaking within states

But countries that want to benefit in an optimal way from these developments should redesign their rulemaking procedures, develop additional processes for effective participation, change the way of working at their justice departments and foreign affairs ministries, and develop new skills. For instance, the best results may be achieved if different rulemaking bodies work on the same urgent problem, each bringing their own perspective, their own networks and their own expertise to the table. Organising this type of competition and cooperation is very different from the centralised approach to legislation that is embedded in most constitutions.

Clinging to traditional state powers not attractive

Of course it is possible to ignore the competition from international rule makers, and just to strive for high quality national legislation. This can be a costly strategy, however. International companies may avoid a country with such a strategy, because deviating standards add to their costs of entering the market. Moreover, a nation-centred approach will make rulemaking more costly and more prone to error. International rulemaking networks contain a wealth of valuable information and will often be able to produce higher quality rules than national experts with more limited experiences.

Providing legitimacy

If national parliaments and ministries of justice can adapt to these realities, they can still play an important role in rulemaking and rule enforcement. For most people, the nation is a group with whom they identify, although it is competing for loyalty with many other groups such as cities, families, tribes, religions and regions. So the nation state can still provide legitimacy to rules. Regulatory agencies and state authorities can systematically certify rules developed elsewhere, if these rules have an impact on their own citizens.

¹⁷⁸ Y.Papadopoulos, Problems of Democratic Accountability in Network and Multilevel Governance, 13 (4) European Law Journal 469, at 485 (2007).

Monitoring effectiveness of private and informal rulemaking

Rule of law criteria, dimensions of justice or assessment tools for accountability can be used in order to monitor the private rulemaking bodies. If government ministries or agencies adapt to this role, they can increase trust in rules among their population, save costs of regulation, and even contribute to the global public good of a common pool of rules. They can also stay in the business of being a crystallization point for urgent rulemaking needs, if they have effective access to international rulemaking bodies.

Innovative ways to cope with conflicts of laws

The fundamental rules regarding civil liability, conformity of goods to the contract, getting a license to operate and criminal liability are left untouched by globalisation. But clients, judges and lawyers will get much more input from different standard-setting bodies when they apply these general principles in concrete cases. Courts and other dispute resolution tribunals have to develop a problem-solving attitude, and new ways to cope with competing sources of good solutions. This attitude is much more effective than identification with one particular body of rules. The same is true for licensing procedures. Most procedures still steer towards rather formal decisions about which rule is applicable, which one is hierarchically superior, or which forum is most appropriate. This is what makes procedures formalistic and bureaucratic. Countries that stick to such formalistic procedures will see that their courts will become less accessible, and more busy with preliminary issues instead of tackling the problem head-on. They will also see the trust in law and rules erode, because people will only see the bureaucracy, not the benefits of multilevel rule systems. Sections 3.5 and 4.5 suggest a number of alternatives to avoid this.

Using informal networks to tackle the biggest problems

Another opportunity from the new rulemaking realities is that informal processes can be used to tackle the world's biggest problems. An entrepreneurial minister of justice, or a world leader such as the Secretary General of the UN can now use his convening power to invite informal rulemaking networks to tackle issues of global warming and other issues requiring more attention.

5.3 Looking for trustees: the future of the rulemaking profession

An emerging rulemaking profession?

Trust in rulemaking will not only come from better procedures and more reflection on how they should be used. It will be mostly a matter of believing that somewhere, somebody looks after the quality of rulemaking processes, on the watch for the signs of possible trouble and guarding the values of transparent, participative and effective rulemaking. Centralised supervision is very unlikely to emerge, however. So it is most likely a group of people who will fulfill the role of trustee. And it is most likely the group of professionals involved in global rulemaking itself that will take up this joint responsibility.

The role of lawyers

The rule makers described in this report mostly have law as their background. Although the legal profession has no formal role in most constitutions, many people think lawyers ensure the quality and integrity of rulemaking. Most lawyers identify with this role as guardians of the rule of law and justice. However, many of them still tend to work from national legal principles, rules and procedures, testing compliance with these rules, sometimes in a rather formalistic way. So this profession needs to become much more diverse, connecting a number of disciplines relevant for all the processes that are part of rulemaking.

A dynamic proposition

Lawyers as a group may raise suspicion, because their involvement does not really guarantee that the new types of rules are fair and address the issues that are important to the many. Lawyers involved in informal and private processes risk being seen as only working for vested interests, in largely secret processes, producing an overload of norms, earning money from all these conflicting rules, rather than building bridges of fairness between people. Other professions nibble at their role of guarantors of justice, as is already happening in the areas of rule design (economists), compliance (accountants) and dispute resolution (a variety of alternative dispute resolution providers). There is much to gain if a dynamic international rulemaking profession would

emerge. Knowing the most effective methods of rulemaking, measuring and monitoring fairness, spotting regulatory failure and capture, finding innovative ways to guarantee transparency, involving local communities in a meaningful way, that could become the core of this profession. Citizens would be able to rely on these professionals. As a collective, they would guarantee the fairness of rules in a similar way as the international medical profession can be relied on for health issues.

Closer to the points in the rulemaking chain where most value is created

This could also give new dynamism to the legal profession. Safeguarding the quality of rulemaking processes, wherever they take place, may be a more attractive proposition for young lawyers, than just knowing how to apply the rules of one national legal system. Such a development would bring the legal profession much closer to the points in the rule production chain where most value is created. They would be seen as the ones that can make rules work for people instead of against them.

Leadership needed

For the consolidation of a global rulemaking profession, leadership is needed. Traditional leaders of the legal profession, such as presidents of bar associations, supreme court justices and deans of law faculties will not find it easy to take up this role. Leadership is more likely to come from international law firms, providers of innovative legal services through the internet or from rule makers becoming involved in the countless private and informal institutions discussed in this report. They are at the centre of current rulemaking activity and do not carry the burden of institutions that exemplify the national legal system.

Changes in legal education

These new leaders will also be able to press for the necessary changes in legal education. Future lawyers will have to learn to make wise choices between countless different options for setting rules and solving disputes. Most of the current students will work in highly specialised environments, where rules are adjusted from day to day. So they require interactive rulemaking skills, ensuring that rules are based on the best available evidence. And, above all, they need to know the methods to enhance the values behind the rule of law and justice.

Interactive rulemaking skills needed

Making students aware that food safety, financial markets and aviation are dealt with by rules coming from international, private networks is not enough. They need other skills than being able to find relevant statutes, treaties and case-law or to apply principles from legal philosophy. Classifications such as private law and public law, or courts and alternative dispute resolution, they do not really help a lawyer who needs to advise about the many different options for solving a conflict. Designing rules is as important as applying rules. As a rule maker, a lawyer needs to understand the dynamics of rulemaking networks and not just the articles of the constitution.

Knowing how to go from knowledge to rules

On top of this, the rule maker of the future needs to know how to integrate interdisciplinary knowledge. Psychology, neurology, and behavioural and social science are teaching us a huge amount about the way people and organisations behave, make choices, and deal with conflict. That should inform the law and the way rules are designed and applied. Rather than systemic beauty and legal logic, members of the future international rulemaking profession should learn to mobilise all available knowledge to help their clients to get the best out of rules.

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List of Abbreviations

AAPA - Association of Asia Pacific Airlines
ADR - Alternative dispute resolution
AEA - Association of European Airlines
AFRAA - African Airlines Association
ANSI - American National Standards Institute
APEC - Asia-Pacific Economic Cooperation
BCBS - Basel Committee on Banking Supervision (Basel Committee)
BCR - Binding Corporate Rules
BIAC - Business and Industry Advisory Committee
CANSO - Civil Air Navigation Services Organisation
CICC - Coalition for the International Criminal Court
DIN - Deutsches Institut für Normung e.V.
EASA - European Advertising Standards Alliance
ECAC - European Civil Aviation Conference
ECB - European Central Bank
ELFAA - European Low Fares Airline Association
EPC - European Payment Council
EPEAT - Electronic Product Environmental Assessment Tool
ERA - European Regions Airline Association
EU – European Union
EUROCONTROL - European Organisation for the Safety of Air Navigation
FDA - US Food and Drug Administration
FSB - Financial Stability Board
FSC - Forest Stewardship Council
G20 - the Group of Twenty Finance Ministers and Central Bank Governors
HiIL - The Hague Institute for the Internationalisation of Law
IACA - International Air Carrier Association
IASB - International Accounting Standard Board
IATA - International Air Transport Association
IBAC - International Business Aviation Council
ICANN - Internet Corporation for Assigned Names and Numbers
ICAO - International Civil Aviation Organisation
ICC - International Criminal Court
ICH - International Conference on Harmonization of Technical Requirements for the Registration of Pharmaceutical Products
IFALPA - International Federation of Air Line Pilots' Associations
IGO - Intergovernmental organisation
IGPA - International Generic Pharmaceuticals Alliance
ILO – International Labour Organization
IMF - International Monetary Fund
INCAF - International Network on Conflict and Fragility
IN-LAW - Informal international lawmaking
IOSCO - International Organization of Securities Commissions
IPF - International Payments Framework
IS-BAO - International Standard for Business Aircraft Operations
ISO - International Organization for Standardization
ITTO – International Tropical Timber Organization
ITU - International Telecommunication Union
KP - Kimberley Process
MNC – Multinational Corporation

NGO - non-governmental organization
OECD - Organisation for Economic Co-operation and Development
PRI - UN Principles of Responsible Investment
SAI - Social Accountability International
SEPA - Single Euro Payment Area
TPR - transnational private regulation
TUAC - Trade Union Advisory Committee
UN – United Nations
UNDP - United Nations Development Programme
WB – World Bank
WEF – World Economic Forum
WHO - World Health Organization

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